

AN
ESSAY
ON
THE LAW
OF
BAILMENTS.

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T H E L A W

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B A I L M E N T S.

By WILLIAM JONES, Esq.

OF THE MIDDLE TEMPLE. *K*

BRITANICUM

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptis-
venditis, *conductis*-*locatis*, quibus vitæ societas continetur,
magni est judicis statuere, (præsertim cùm in plerisque sint
judicia contraria) *quid quemque cuique præstare oporteat.*

Q. SCÆVOLA, apud Cíc. de Offic. lib. III.

L O N D O N,

PRINTED BY J. NICHOLS;

FOR CHARLES DILLY, IN THE POULTRY.

MDCCLXXXI.

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AN
E S S A Y

ON
THE LAW

OF
BAILMENT.

BY WILLIAM JONES, ESQ.

FH
MVSEVM
BRITANNICVM

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MDCCLXXXI.

A N
E S S A Y
O N T H E
L A W O F B A I L M E N T S.

HAVING lately had occasion to examine with some attention the nature and properties of that contract, which lawyers call BAILMENT, or, *A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered*, I could not but observe with surprise, that a title in our ENGLISH law, which seems the most generally interesting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties, which attend our abstruse, though elegant, system of

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real property, and without being at all acquainted with that exquisite logick, on which our rules of special pleading are founded; but there is hardly a man of any age or station, who does not every week and almost every day contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depository* or a person *depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more absurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights, of which we have no just idea? Nor must it ever be forgotten, that the contracts above-mentioned are among the principal springs and wheels of civil society; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems therefore astonishing, that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, *the doctrine of bailments* should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other

other part, perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining, that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgements apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of *English* law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other, subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for he represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of a *distinct species*; he says nothing of employment by *commission*; he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words [a]. His commentaries are the most correct and beautiful outline, that ever was exhibited of any human

[a] 2 Comm. 452, 453, 454.

science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, *Englishmen* might hope at length to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work, which every lover of humanity and peace must anxiously wish to see accomplished. The following essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary, in the Commentaries on the Laws of ENGLAND.

I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed *historically*, to show with what perfect harmony those principles are recognised and established by other nations, especially the ROMANS, as well as by our ENGLISH courts, when their decisions are properly understood and clearly distinguished; after which I shall resume *synthetically* the whole learning of *bailments*, and expound such rules, as, in my humble apprehension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.

From

From the obligation, contained in the definition of bailment, *to restore the thing bailed at a certain time*, it follows, that the bailee must *keep* it, and be *responsible* to the bailor, *if it be lost or damaged*; but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment*; and the investigation of this *degree* in every particular contract is the problem, which involves the principal difficulty.

There are infinite shades of *care* or *diligence* from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but *extremes* in this case, as in most others, *are inapplicable to practice*: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man, who borrows a book or a seal. The degrees then of care, for which we are seeking, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular

ticular times, yet we may perceive, that *the generality of rational men* use nearly the same degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own* concerns, is a proper measure of that, which would uniformly be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here then we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care, which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention, which a man *remarkably exact and thoughtful* gives to the securing of his personal property.

The fixed mode or standard of diligence I shall (for want of an apter epithet) invariably call ORDINARY; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent

vent the least obscurity. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called LESS, and the second, MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abstract morality; but in practice and actual life they are commonly false: they are often, indeed, used for mere *intensives*, as *the most diligent* for *very diligent*; but this is a rhetorical figure; and, as rhetoric, like her sister poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth: for this reason I would reject from the present inquiry all such expressions as *the utmost care*, *all possible*, or *all imaginable*, *diligence*, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated, they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series of variable
modes

modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust and a deviation from common honesty. This known, or fixed, point of negligence is therefore a mean between *fraud* and *accident*; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as *a man of common sense, however inattentive*, and of such as a *very cautious and vigilant* man, respectively take of *their own possessions*.

The constant, or fixed, mode of *default* I likewise call ORDINARY, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes the first may be called GREATER, and the second, LESS, THAN ORDINARY,

NARY, or the first GROSS, and the other, SLIGHT neglect.

It is obvious, that a bailee of common honesty, if he also have common prudence, would not be *more negligent than ordinary* in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of *fraud* may be conceived increasing in a series from the term, where *gross neglect* ends, to a term, where positive *crime* begins; as *crimes* likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of *accident* from the limit of extremely slight neglect to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities; but it does not follow, that *neglect*, *deceit*, and *accident*, are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence*, which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

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When the contract is *reciprocally beneficial to both parties*, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect*; but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the *bailee*, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than *good faith* were exacted from such a person, that is, if he were to be made answerable for less than *gross neglect*, few men after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reasonable, that he, *who receives the benefit, should bear the burden*, but, if he were not obliged to be *more than ordinarily* careful, and bound to answer even for *slight neglect*, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

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This distinction is conformable not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for *ordinary*, or *slight*, neglect, or even for inevitable *accident*: hence, as an agreement, *that a man may safely be dishonest*, is repugnant to decency and morality, and, as no man shall be *presumed* to bind himself against *irresistible force*, it is a just rule, that *every* bailee is responsible for *fraud*, even *though* the contrary be stipulated, but that *no* bailee is responsible for *accident*, *unless* it be most expressly so agreed.

The plain elements of natural law, on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or *historical*, part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.

Of all known laws the most ancient and venerable are those of the JEWS; and among the *Mosaick* institutions we have some curious rules on the very subject before us; but, as they are

not numerous enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places: for a similar reason, I shall say nothing here of the *Attick* laws on this title, but shall proceed at once to that nation, by which the wisdom of ATHENS was eclipsed, and her glory extinguished.

The decisions of the old *Roman* lawyers, collected and arranged in the sixth century by the order of JUSTINIAN, have been for ages, and in some degree still are, in bad odour among *Englishmen*: this is an honest prejudice, and flows from a laudable source; but a prejudice, most certainly, it is, and, like all others, may be carried to a culpable excess.

The constitution of ROME was originally excellent; but, when it was *settled*, as historians write, by AUGUSTUS, or, in truer words, when that base dissembler and cold-blooded assassin C. *Octavius* gave law to millions of honest, wiser, and braver men than himself by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of a law [b]: had it even been voluntarily conceded, as it was in truth forcibly extorted, it

[b] D. 1. 4. 1.

could

could not have bound the *sons* of those who consented to it; for "a renunciation of *personal* rights, especially rights of the highest nature, can have no operation beyond the *persons* of those, who renounce them." Yet, iniquitous and odious as the *settlement* of the constitution was, ULPIAN only spoke in conformity to it, when he said that "the will of the prince had the force of law;" that is, as he afterwards explains himself, *in the ROMAN empire*; for he neither meant, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early NORMAN kings, that some of them, according to Sir JOHN FORTESCUE, "were not pleased with their own laws, but exerted themselves to introduce the civil laws of *Rome* into the government of ENGLAND [*c*];" and so hateful was it to our sturdy ancestors, that, if JOHN of SALISBURY be credited, "they burned and tore all such books of civil and canon law as fell into their hands [*d*];" but this was intemperate zeal; and it would have been sufficient to improbate the *publick*, or *constitutional*, maxims of the *Roman* imperial law, as absurd in themselves as well as inapplicable to our free government, without

[*c*] *De Laud. Leg. Angl.* c. 33, 34.

[*d*] *Seld. in Fort.* c. 33.

rejecting

rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the *Romans* are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of SEVERUS or CARACALLA, which were laws, it seems, at *Rome*, have certainly no kind of authority at *Westminster*; but, in questions of *rational* law, no cause can be assigned, why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all instances, to reconcile NERVA with PROCULUS, LABEO with JULIAN, and GAIUS either with CELSUS or with himself, I shall proceed to exhibit a summary of the *Roman* law on the subject of *responsibility for neglect*.

The two great sources, whence all the decisions of civilians on this matter must be derived, are *two* laws of ULPIAN; the first of which is taken from his work on *Sabinus*, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according

ing to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

“ Some contracts, says the great writer on *Sabinus*, make the party responsible for DECEIT ONLY ; some, for both DECEIT AND NEGLECT. “ Nothing more than *responsibility for* DECEIT “ *is demanded* in DEPOSITS and POSSESSION AT “ WILL ; both DECEIT AND NEGLECT *are inhibited* in COMMISSIONS, LENDING FOR USE, “ CUSTODY AFTER SALE, TAKING IN PLEDGE, “ HIRING ; also in PORTIONS, GUARDIANSHIPS, “ VOLUNTARY WORK : (among these some *require even more than ordinary* DILIGENCE). “ PARTNERSHIP and UNDIVIDED PROPERTY “ *make the partner and joint-proprietor* answerable for both DECEIT AND NEGLIGENCE [*e*]. ”

“ In contracts, says the same author in his “ other work, we are sometimes responsible for “ DECEIT ALONE ; sometimes, for NEGLECT “ ALSO ; for DECEIT ONLY in DEPOSITS ; be-

[*e*] *Contractus quidam DOLUM malum DUNTAXAT recipiunt ; quidam, et DOLUM ET CULPAM. DOLUM tantum DEPOSITUM et PRECARIUM ; DOLUM ET CULPAM, MANDATUM, COMMODATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM ; item DOTISDATIO, TUTELÆ, NEGOTIA GESTA : (in his QUIDAM et DILIGENTIAM). SOCIETAS et RERUM COMMUNIO et DOLUM ET CULPAM recipit. D. 50. 17. 23.*

“ cause,

“cause, since NO BENEFIT accrues to the depo-
 “sitary, he can justly be answerable for no more
 “than DECEIT; but, if a REWARD happen to
 “be given, then a *responsibility for* NEGLECT
 “ALSO is required; or, if it be agreed at the
 “time of the contract, that the depositary
 “shall answer both for NEGLECT and for AC-
 “CIDENT: but, where A BENEFIT accrues to
 “BOTH parties, as in KEEPING A THING SOLD,
 “as in HIRING, as in PORTIONS, as in PLEDGES,
 “as in PARTNERSHIP, both DECEIT AND NEG-
 “LECT make the party liable. LENDING FOR
 “USE, indeed, is for the most part BENEFICIAL
 “to the BORROWER ONLY; and, for this reason,
 “the better opinion is that of Q. MUCIUS, who
 “thought, that HE should be responsible not
 “only for NEGLECT, but even for the omission of
 “*more than ordinary* DILIGENCE [f].”

[f] In contractibus interdum DOLUM SOLUM, in-
 terdum ET CULPAM, præstamus; DOLUM in DE-
 POSITO; nam, quia NULLA UTILITAS ejus versatur,
 apud quem deponitur, merito DOLUS præstatur SOLUS;
 nisi fortè et MERCES accessit, tunc enim, ut est et con-
 stitutum, ETIAM CULPA exhibetur; aut, si hoc ab
 initio convenit, ut et CULPAM et PERICULUM præstet
 is, penes quem deponitur: sed, ubi UTRUSQUE UTI-
 LITAS vertitur, ut in EMPTO, ut in LOCATO, ut in
 DOTE, ut in PIGNORE, ut in SOCIETATE, et DOLUS
 ET CULPA præstatur. COMMODATUM autem ple-
 rumque SOLAM UTILITATEM continet ejus, CUI COM-
 MODATUR; et ideo verior est Q. MUCII sententia
 existimantis et CULPAM præstandam et DILIGENTIAM.
 D. 13. 6. 5. 2.

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in *Latin*[g], one or two in *Greek*[b], and some in the *modern* languages of EUROPE, besides the general expositions of that important part of the digest, in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages, which have any obscurity in the words or the sense of them. CAMPANUS, indeed, who was both a lawyer and a poet, has turned the first law of *Ulpian* into *Latin* hexameters; and his authority, both in

[g] BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GIPHANIUS, J. GODEFROI, and others.

[b] The scholium on *Harmenopulus*, l. 6. tit. de Reg. Jur. n. 55. may be considered as a commentary on this law.

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prose and verse, confirms the interpretation, which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old *Roman* lawyers, even the most eminent, have written on the subject; secondly, the loose and equivocal sense of the words *DILIGENTIA* and *CULPA*; lastly and principally, the darkness of the parenthetical clause *IN HIS QUIDAM ET DILIGENTIAM*, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author *Greek* or *Latin*. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the pandects, and the manuscripts, from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by *CUJAS*, *P. FABER*, *LE CONTE*, *DONELLUS*, and *most* others, as giving a sense both perspicuous in itself and consistent with the second law; but the *FLORENTINE* copy has *quidem*, and the copies, from which the *Basilica* were translated three centuries after *JUSTINIAN*, appear to have contained the same word, since the *Greeks* have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of *ULPIAN*; for, if it be agreed, that *diligentia* means, by a figure of speech, *a more than*

than ordinary degree of diligence, the common reading will imply, conformably with the second law before cited, that “SOME of the preceding “contracts demand that higher degree;” but the *Florentine* reading will denote, in contradiction to it, that “ALL of them require more “than ordinary exertions.”

It is by no means my design to depreciate the authority of the venerable manuscript preserved at *Florence*; for, although few civilians, I believe, agree with POLITIAN, in supposing it to be one of the *originals*, which were sent by *Justinian* himself to the principal towns of *Italy* [i], yet it may *possibly* be the very book, which the Emperor LOTHARIUS II. is *said* to have found at *Amalfi* about the year 1130, and gave to the citizens of PISA, from whom it was taken, near three hundred years after, by the *Florentines*, and has been kept by them with superstitious reverence [k]: be that as it may, the copy deserves the highest respect; but, if any proof be requisite, that it is *no faultless* transcript, we may observe, that, in the very law before us, *accedunt* is erroneously written for *accidunt*; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the *Greek* interpreters, and conveys a meaning, as BOCERUS and others

[i] Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

[k] Taurelli, Præf. ad Pand. Florent.

have remarked, not supportable by any principle or analogy.

This, too, is indisputably clear; that the sentence, *in his QUIDEM et diligentiam*, is ungrammatical, and cannot be construed according to the interpretation, which some contend for. What verb is understood? *Recipiunt*. What noun? *Contractus*. What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among*? And, in that case, the difference between QUIDEM and QUIDAM vanishes; for the clause may still import, that “AMONG “the preceding contracts (that is, *in some of “them*), more than usual diligence is exacted:” in this sense the Greek preposition seems to have been taken by the scholiast on HARMENOPULUS; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies, as the Greeks have rendered it; but ACCURSIUS, DEL RIO, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole sentence, “in his *contractibus* “*quidam jurisconsulti et diligentiam requirunt*,” but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that *Ulpian* was of a different opinion. As to the last conjecture, that only *certain cases* and *circumstances* are meant by the word

QUIDAM,

QUIDAM, it scarce deserves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as *Taurelli* himself admits, a *Greek*. Whatever, in short, be the genuine words of this much-controverted clause, I am persuaded, that it ought by no means to be strained into an inconsistency with the *second* law; and this has been the opinion of *most* foreign jurists from *Azo* and *ALCIAT* down to *HEINECCIUS* and *HUBER*; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.

The law then on this head, which prevailed in the ancient *Roman* empire, and still prevails in *Germany*, *Spain*, *France*, *Italy*, *Holland*, constituting, as it were, a part of the law of nations, is in substance what follows.

GROSS neglect, *lata culpa*, or, as the *Roman* lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *DOLUS*, or *FRAUD*, itself; and consists, according to the best interpreters, in the *omission* of that care, *which even inattentive and thoughtless men never*
fail

fail to take of their own property: this fault they justly hold a violation of *good faith*.

ORDINARY neglect, *levis culpa*, is the want of that diligence, which the *generality of mankind use in their own concerns*; that is, of *ordinary care*.

SLIGHT neglect, *levissima culpa*, is the *omission of that care, which very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence*.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either *express or implied*, civilians establish *three principles*, which they deduce from the law of *Ulpian on the Edict*; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus* [1]; as many poems and histories in ancient languages are denominated from their *initial words*.

First: In contracts, which are beneficial *solely to the owner of the property holden by another*, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross neglect*: this, therefore, is the general rule in *DEPOSITS*; but, in regard to *COMMISSIONS*, or, as foreigners call them, *MAN-*

[1] Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Instead of ff, which is a barbarous corruption of the initial letter of *παραδέχαι*, many write D, for *Digest*, with more clearness and propriety.

DATES, and the *implied* contract *negotiorum gestorum*, a certain care is requisite from *the nature of the thing*; and, as *good faith* itself demands, that such care be proportioned to the exigence of each particular case, the law *presumes*, that the mandatary or commissioner, and, by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence adequate to the performance of the work undertaken [m].

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in those of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, such care is exacted, as *every prudent man commonly takes of his own goods*; and, by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *coproprietor*, are answerable for *ordinary* neglect.

Thirdly: In contracts, from which a benefit accrues *only* to him, who has the goods in his custody, as in that of LENDING FOR USE, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore, responsible for *slight* negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of *Roman* law; and it is very remarkable, that even ANTOINE FAVRE, or *Faber*, who

[m] *Spondet diligentiam*, say the *Roman* lawyers, *gerendo negotio parem*.

was famed for innovation and paradox, who published two ample volumes *De Erroribus Interpretum*, and whom GRAVINA justly calls *the boldest of expositors and the keenest adversary of the practisers* [n], discovered no error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger GODEFROI of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient *Romans*, and endeavours to support a new system of his own.

He adopts, in the first place, the *Florentine* reading, of which the student, I hope, has formed by this time a decided opinion from a preceding page of this essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and support of MODESTINUS, of PAULUS, of AFRICANUS, of GAIUS, and of the great PAPINIAN himself; nor does he satisfactorily prove the *fallaciousness*, to which he objects, unless every rule be fallacious, to which there are some exceptions. He understands by DILIGENTIA that care, which *a very attentive and*

[n] Orig. Jur. Civ. lib. i. § 183.

vigilant man takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the disputed clause: in the *two*, which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above stated, and uses the common epithets *levis* and *levissima*; but, in order to reconcile his system with many laws, which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that ULPIAN himself *must have changed his mind*.

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head to that most dangerous and most tremendous power, *the discretion of the judge* [o].

The *triple* division of neglects had also been highly censured by some lawyers of reputation. ZASIUS had very justly remarked, that neglects differed in *degree*, but not in *species*; adding, “that he had no objection to the use of the words *levis* and *levissima*, merely as terms of practice adopted in courts, for the more easy distinction between the different degrees of

[o] “Ego certè hac in re consentibus accedo, vix quidquam generalius definiri posse; remque hanc ad arbitrium judicis, prout res est, referendam.” p. 141.

“care exacted in the performance of different “contracts [p]:” but DONELLUS, in opposition to his master *Duaren*, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism [q]; the minor proposition of which is raised on the figurative and inaccurate manner, in which positives are often used for superlatives, and conversely, even by the best of the old *Roman* lawyers. True it is, that, in the law *Contractus*, the division appears to be *two-fold* only, *DOLUS* and *CULPA*; which differ in *species*, when the first means *actual fraud and malice*, but in *degree* merely, when it denotes no more than *gross neglect*; and, in either case, the second branch, being capable of *more and less*, may be subdivided into *ordinary* and *slight*; a subdivision, which the law *Si ut certo* obviously requires: and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence*; for, when *good faith* is considered as implying at least the exertion of *slight* attention, the other branch, *Care*, is subdivisible into *ordinary* and *extraordinary*; which brings us back

[p] *ZAS. Singul. Resp.* lib. i. cap. 2.

[q] “*Quorum definitiones eadem sunt, ea inter se sunt eadem; levis autem culpæ et levissimæ una et eadem definitio est: utraque igitur culpa eadem.*” *Comm. Jur. Civ.* lib. xvi. cap. 7.

to the number of degrees already established both by the analysis and by authority.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the parliament of PARIS, who may, probably, be now living, and, possibly, in that professional station, to which his learning and acuteness justly entitle him. I speak of M. LE BRUN, who published, not many years ago, an *Essay on Responsibility for Neglect* [r], which he had nearly finished, before he had seen the commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges Godefroi with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidam et diligentiam*; and that with an air of triumph; insinuating, that *quidam* was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing *their* system; and he supports *his own* reading by the authority of the BASILICA; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting*

[r] *Essai sur la Prestation des Fautes*, à Paris, chez Saugrain, 1764.

negligence in any contract, and urges, that such *permission*, as he calls it, is against express law :
“ now, says he, where a contract is beneficial to
“ both parties, the doctors permit *slight* neg-
“ ligence, which, how slight soever, is still *neg-*
“ *ligence*, and ought always to be inhibited.”
He warmly contends, that the ROMAN laws, properly understood, admit only *two* degrees of diligence ; one, measured by that, which a *provident and attentive father of a family* uses in his own concerns ; another, by that care, which the *individual party*, of whom it is required, is *accustomed to take of his own possessions* ; and he, very ingeniously, substitutes a new rule in the place of that, which he rejects ; namely, that, *when the things in question are the SOLE property of the person, to whom they must be restored*, the holder of them is obliged to keep them with the *first* degree of diligence ; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect ; that a vendor, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man, who undertakes to manage the affairs of another, either *without* his request, as a *negotiorum gestor*, or *with* it, as a *mandatary* :
“ but, says he, *when the things are the JOINT*
“ *property of the parties contracting*, no higher
“ diligence can be required than the second de-
“ gree, or that, which the *acting party* com-
“ monly uses in *his own* affairs ; and it is
“ sufficient,

“sufficient, if he keep them, as he keeps his own.” This he conceives to be the distinction between the *eight* contracts, which precede, and the *two*, which follow, the words in *his quidem et diligentiam*.

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was composing some of his admirable *treatises* on all the different species of express, or implied, *contracts*; and here I seize with pleasure an opportunity of recommending those treatises to the *English* lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at *Westminster* as well as at *Orleans* [s]: for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater

[s] *Œuvres de M. Pothier*, à Paris, chez DEBURE: 28 volumes in *duodecimo*, or 6 in *quarto*. The illustrious author died in 1772.

benefit to the publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which *every man*, according to lord COKE, *owes to his profession*.

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work; and M. POTHIER honoured it with a short, but complete, answer in the form of a *General Observation on his Treatises* [t]; declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed*. This is the substance of his answer: “ that he
 “ can discover no kind of absurdity in the usual
 “ division of *neglect* and *diligence*, nor in the
 “ rule, by which different *degrees* of them are
 “ applied to different contracts; that, to speak
 “ with strict propriety, negligence is not *per-*
 “ *mitted* in any contract, but a *less rigorous con-*
 “ *struction* prevails in some than in others; that
 “ a *hirer*, for instance, is not considered as *neg-*
 “ *ligent*, when he takes the same care of the
 “ goods hired, which the generality of man-
 “ kind take of their own; that the *letter to hire*,
 “ who has his reward, must be presumed to have

[t] It is printed apart, in *fourteen* pages, at the end of his treatise on the *Marriage-contract*.

“ demanded

“ demanded at first no higher degree of diligence, and cannot justly complain of that
“ *inattention*, which in another case might have
“ been culpable; for a *lender*, who has *no* reward, may fairly exact from the borrower that
“ *extraordinary* degree of care, which a *very attentive person of his age and quality* would certainly
“ have taken; that the diligence, which *the*
“ *INDIVIDUAL party commonly uses in his own*
“ *affairs*, cannot properly be the object of judicial inquiry; for *every* trustee, administrator,
“ partner, or co-proprietor, must be *presumed* by
“ the court, auditors, or commissioners, before
“ whom an account is taken, or a distribution
“ or partition made, to use in *their own* concerns
“ such diligence, as is commonly used by *all*
“ *prudent men*; that it is a violation of *good*
“ *faith* for any man to take less care of another’s
“ property, which has been intrusted to him,
“ *than of his own*; that, consequently, the author of the new system demands no more of
“ a *partner* or a *joint-owner* than of a *depository*,
“ who is bound to keep the goods deposited *as*
“ *he keeps his own*; which is directly repugnant
“ to the indisputable and undisputed sense of
“ the law *Contractus*.”

I cannot learn, whether M. LE BRUN ever published a reply, but am inclined to believe, that his system has gained very little ground in *France*, and that the old interpretation continues
universally

universally admitted on the continent both by theorists and practisers.

Nothing material can be added to POTHIER's argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to set down a few general remarks on the controversy: particular observations might be multiplied without end.

The only *essential* difference between the systems of GODEFROI and LE BRUN relates to the *two* contracts, which follow the much-disputed clause; for the *Swiss* lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honesty*: now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of *Marriage-portions* [u].

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-confuted: he begins with engaging to prove "that only *two* degrees "of fault are distinguished by the laws of "*Rome*," and ends with drawing a conclusion, that they acknowledge but *one* degree; now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of

[u] See p. 71. *note*. and p. 126.

diligence,

diligence, the *omissions* of which are as many neglects; exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that, which he repudiates. It is true, that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system [v].

The disquisition amounts in fact to this: from the barrenness or *poverty*; as LUCRÉTIUS calls it, of the *Latin* language, the single word CULPA includes; as a generick term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the *Greek*, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words *ῥαθυμία* and *ἀμέλεια*, which are by no means synonymous; the former implying a certain *easiness of mind* or *remissness of attention*, while the second imports a higher and more culpable degree of *negligence* [w]. This observation, indeed, seems to

[v] See pages 32. 73. 74. 149.

[w] *Basilica*, 2. 3. 23. See *Demosth.* 3 *Phil.* Reiske's edit. I. 112. 3. For *levissima culpa*, which occurs but once in the whole body of *Roman law*, *ῥαθυμία* seems the proper word in *Greek*; and it is actually so used in the *Basilica*, 60. 3. 5. where men-

to favour the system of *Godefroï*; but I lay no great stress on the mere words of the translation, as I cannot persuade myself, that the *Greek* jurists under *BASILIUS* and *LEO* were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that, which *POTHIER* has recommended and illustrated.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest *Year-book* or *Treatise* to the latest adjudged *Case*; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment, observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man *possesses for a time the goods of another*; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished: it will be sufficient to remark, that the rules are in general the same,

tion is made of the *Aquilian* law, in *quâ*, says *ULPIAN*,
et levissima culpa venit. D. 9. 2. 44.

by

by whatever means the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding [x], or in consequence of some distinct contract.

Sir JOHN HOLT, whom every *English* man should mention with respect, and from whom no *English* lawyer should venture to dissent without extreme diffidence, has taken a comprehensive view of this whole subject in his judgement on a celebrated case, which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument [y].

His division of bailments into *six* sorts appears, in the first place, a little inaccurate; for, in truth, his *fifth* sort is no more than a branch of his *third*, and he might with equal reason have added a *seventh*, since the fifth is capable of another subdivision. I acknowledge, therefore, but *five* species of bailment; which I shall now enumerate and define, with all the *Latin* names, one or two of which lord *Holt* has omitted. 1. DE-

[x] Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. *Mulgrave* and *Ogden*.

[y] Lord Raym. 912.

POSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MANDATUM, or *commission*; when the mandatory undertakes, without recompence, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* sorts, to *keep*, and to *employ* [z]. 3. COMMODATUM, or *loan for use*; when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. LOCATUM, or *hiring*, which is always for a *reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary use of *the thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpose of being *carried* from place to place, either to a *publick* carrier, or to a *private* person.

I. The most ancient case, that I can find in our books, on the doctrine of DEPOSITS (there were others, indeed, a few years earlier, which turned on points of pleading) was adjudged in the eighth of Edward II. and is abridged by Fitzherbert [a]. It may be called BONION's case,

[z] Law, B. 2. Ch. 18.

[a] Mayn. Edw. II. 275. Fitzh. Abr. tit. Detinue, 59.

from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for *seals, plate, and jewels*, and the defendant pleaded, "that the plaintiff had bailed to him "a chest *to be kept*, which chest was *locked*; that "the bailor himself took away the key, *without* "informing the bailee of the contents; that robbers came in the NIGHT, *broke open the defendant's chamber*, and carried off the chest into "the fields, where they forced the lock, and "took out the contents; that the defendant was "robbed at the same time of his own goods." The plaintiff replied, "that the jewels were delivered, in a chest *not locked*, to be restored at "the pleasure of the bailor," and *on this*, it is said, *issue was joined*.

Upon this case lord *Holt* observes, "that he "cannot see, why the bailee should not be "charged with goods *in* a chest as well as "with goods *out of* a chest; for, says he, the "bailee has as little power over them, as to any "benefit, that he might have from them, and "as great power to defend them, in one case as "in the other [*b*]." The very learned judge was dissatisfied, we see, with Sir *Edward Coke's* reason, "that, when the jewels were locked up in "a chest, the bailee was not in fact trusted with "them [*c*]." Now there was a diversity of opinion, upon this very point, among the greatest

[*b*] Lord Raym. 914.

[*c*] 4 Rep. 84.

lawyers of *Rome*; for “ it was a question, whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes, which it contained, should also be specified; and TREBATIUS insists, that the box only, not the particular contents of it, must be sued for; unless the things were previously shown, and then deposited: but LABEO asserts, that he, who deposits the box, deposits the contents of it; and ought therefore to demand the clothes themselves. What then, if the depositary *was ignorant of the contents?* It seems to make no great difference, since he took the charge upon himself; and I am of opinion, says *Ulpian*, that, although the box was sealed up, yet an action may be brought for what it contained [*d*].” This relates chiefly to the form of the libel; but, surely, cases may be put, in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought *from their nature* to be kept with peculiar care under lock and key: it would, therefore, be *gross* negligence in a depositary to leave such a deposit in an open antichamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, therefore, it

[*d*] D. 16.3. 1. 41.

would

would be no more than *slight* neglect, to leave out of a drawer a box or casket, which was neither known, nor could justly be suspected, to contain diamonds; and DOMAT, who prefers the opinion of *Trebatius*, decides, “that, in such a case, the depositary would only be obliged to restore the casket, as it was delivered, without being responsible for the contents of it.” I confess, however, that, anxiously as I wish on all occasions to see authorities respected, and judgments holden sacred, BONION’s case appears to me wholly incomprehensible; for the defendant, instead of having been *grossly* negligent (which alone could have exposed him to an action), seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help suspecting a mistake in the last words *alii quòd non*; although *Richard de Winchedon*, or whoever was the compiler of the *table* to this Year-book, makes a distinction, that, “if jewels be bailed to me, and I put them into a casket, and *thieves rob me of them in the night time*, I am answerable; not, if they be delivered to me in a chest *sealed up* ;” which could never have been law; for the next oldest case, in the book of *Affise*, contains the opinion of chief justice THORPE, that “a general bailee to keep is not responsible, if the goods be stolen, with-
“ out

“out his *gross* neglect [*e*];” and it appears, indeed, from *Fitzherbert*, that the party was driven to this issue, “whether the goods were taken away “by *robbers*.”

By the *Mosaick* institutions, “if a man delivered to his neighbour MONEY OR STUFF *to keep*, and it was *stolen* out of his house, and the thief could not be found, the master of the house was to be brought before the judge, and to be discharged, if he could swear, that he had not *put his hand* unto his neighbour’s goods [*f*],” or, as the *Roman* author of the *LEX DEI* translates it, *Nilil se nequiter gessisse* [*g*]; but a distinction seems to have been made between a stealing by *day* and a stealing by *night* [*h*]; and “if CATTLE were bailed and stolen, (by *day*, I presume) the person, who had the care of them, was bound to make restitution to the owner [*i*];” for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a *depository*, and is, consequently, obliged to use a degree of diligence *adequate to the charge*: now sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that, when JACOB, who was, for a long time at least,

[*e*] 29 Aff. 28. Bro. Abr. tit. Bailment, pl. 7.

[*f*] Exod. xxii. 7, 8.

[*g*] Lib. 10. De Deposito. This book is printed in the same volume with the *Theodosian Code*, Paris, 1586.

[*h*] Gen. xxxi. 39.

[*i*] Exod. xxii. 12.

a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, LABAN made him answer for them "whether stolen "by day or stolen by night [*k*]."

Notwithstanding the high antiquity as well as the manifest good sense of the rule, a contrary doctrine was advanced by Sir EDWARD COKE in his *Reports*, and afterwards deliberately inserted in his *Commentary on LITTLETON*, the great result of all his experience and learning; namely, "that a depositary is responsible, if the goods be "stolen from him, unless he accept them specially *to keep as his own*," whence he advises all depositaries to make such a special acceptance [*l*]. This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-books, mere conversations on the bench or loose arguments at the bar; and partly on SOUTHCOTE's case, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgement given on them.

SOUTHCOTE declared in detainue, that he had delivered goods to BENNET, *to be by him SAFELY*

[*k*] Gen. xxxi. 39.

[*l*] 4 Rep. 83. b. 1 Inst. 89. a. b.

kept: the defendant confessed such delivery, but pleaded in bar, that a certain person *stole* them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a *SERVANT* of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reason of the judgement, says "lord *Coke*, was, because the plaintiff had delivered the goods to be *SAFELY* kept, and the defendant had taken the charge of them upon himself, by accepting them on such a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reflections on the case itself; namely, "that *to KEEP* and *to keep SAFELY* are "one and the same thing;" a notion, which was denied to be law by the whole court in the time of chief justice *Holt* [m].

It is far from my intent to speak in derogation of the great commentator on *Littleton*; since it may truly be asserted of him, as *Quintilian* said of *CICERO*, that *an admiration of his works is a sure mark of some proficiency in the study of the law*; but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

[m] *Ld. Raym. 911. margin.*

The

The pleader, who drew the replication in *Southcote's* case, must have entertained an idea, that the *blame* was *greater*, if a *servant* of the depository stole the goods, than if a mere *stranger* had purloined them ; since the defendant ought to have been more on his guard against a person, who had so many opportunities of stealing ; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not morally certain : the court, we find, rejected this distinction, and also held the replication informal, but agreed, that no advantage could be taken on a *general* demurrer of such informality, and gave judgement on the substantial badness of the plea [n]. If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, “ that, although a *general* bailee to keep be “ responsible for GROSS neglect *only*, yet *Bennet* “ had, by a *special* acceptance, made himself answerable for ORDINARY neglect *at least* ; that “ it was *ordinary* neglect, to let the goods be *stolen* “ out of his possession, and he had not averred, “ that they were stolen *without his default* ; that “ he ought to have put them into a *safe* place, “ according to his undertaking, and have kept “ the key of it himself ; that the *special* bailee “ was reduced to the class of a *conductor operis*, “ or a workman *for hire* ; and that a tailor, to “ whom his employer has delivered lace for a

[n] 1 Cro. 815.

"suit of clothes, is bound, if the lace be *stolen*,
 "to restore the value of it [o]." This reason-
 ing would not have been just, if the bailee had
 pleaded, as in *Bonion's* case, that he had been
robbed by violence, for no degree of care can in
 general prevent an open robbery: *impetūs præ-*
donum, says ULPAN, *à nullo præstantur*.

Mr. Justice POWELL, speaking of *Southcote's*
 case, which he denies to be law, admits, that, "if
 "a man *does* undertake *specially* to keep goods
 "SAFELY, that is a warranty, and will oblige the
 "bailee to keep them safely against perils, where
 "he has a remedy over, but not against those
 "where he has no remedy over [p]." One is un-
 willing to suppose, that this learned judge had
 not read lord *Coke's* report with attention; yet
 the case, which he puts, is precisely that which
 he opposes, for Bennet *did* undertake "to keep
 "the goods SAFELY;" and, with submission, *the*

[o] "*Alia est furti ratio; id enim non casui, sed*
levi culpa, ferè ascribitur." *Gothofr. Comm. in*
D. Contractus, p. 145. See D. 17. 2. 52. 3. where
 says the annotator, "*Adversus latrones parùm prodest*
custodia; adversus furem prodesse potest, si quis ad-
vigilet." See also POTH. *Contrat de Louage*, n. 429.
 and *Contrat de Pret à usage*, n. 53. So, by justice
Cottesmores, "*Si jeo grante byens a un home a garder*
a mon oepe, si les byens per son mesgarde sont embles,
il fera charge a moy de mesmes les byens, mez s'il
soit robbe de mesmes les byens, il est excusable per
le ley." 10 Hen. VI. 21.

[p] *Ld. Raym.* 912.

degree

degree of care demanded, not the remedy over, is the true measure of the obligation; for the bailee might have his appeal of robbery, yet he is not bound to keep the goods against robbers without a most exprefs agreement [q]. This, I apprehend, is all that was meant by St. GERMAN, when he says, "that, if a man have nothing for keeping the goods bailed, and promise, at the time of the delivery, to restore them safe at his peril, he is not responsible for mere casualties [r];" but the rule extracted from this passage, "that a special acceptance to keep safely will not charge the bailee against the acts of wrongdoers [s]," to which purport HOBART also and CROKE are cited, is too general, and must be confined to acts of violence.

I cannot leave this point, without remarking, that a *tenant at will*, whose interest, when he has it rentfree, the *Romans* called *PRECARIUM*, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit only, yet he has an *interest* in the land till the will is determined, "and, our law adds, it is the folly of the lessor, if he do not restrain him by a special condition:" thence it was adjudged, in the *Countess of Shrewsbury's* case, "that an

[q] 2 Sho. pl. 166.

[r] Doct. and Stud. dial. 2. chap. 38.

[s] Com. 135. Ld. Raym. 915.

"action

“action will not lie against a tenant at will generally, if the house be burned through his neglect [t];” but, says justice *Powell*, “had the action been founded on a *special* undertaking, as that, in consideration that the lessor would let him live in the house, he would deliver it up in as good repair as it then was in, such an action would have been maintainable [u].”

It being then established, that a bailee of the first sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself a *careless and inattentive* man; a question may arise, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight*; and it seems easy to support the affirmative; since in this case the measure of diligence is *that, which the bailee uses in his own affairs*. It must however be confessed, that the character of the individual depositary can hardly be an object of judicial discussion: if he be *slightly* or even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if it be proved,

[t] 5 Rep. 13. b.

[u] Ld. Raym. 911.

for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner [w]. If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or silks; in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own. Still farther; if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person [x].

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

First, as in *Southcote's* case, where the bailee, by a *special* agreement, has engaged to answer for more: "Si quid nominatim convenit," says the *Roman* lawyer, "vel plus vel minus in fin-

[w] POTH. *Contrat de Dépôt*, n. 29. Stiernh. *de Jure Sueon.* l. 2. c. 5.

[x] Bract. 99. b. Justin. *Inst.* l. 3. tit. 15.

“*gulis contractibus, hoc servabitur quod initio*
 “*convenit; legem enim contractui dedit [y];*”
 but the opinion of CELSUS, that an agreement
to dispense with deceit is void, as being contrary
 to good morals and decency, has the assent both
 of Ulpian and our *English* courts [z].

Secondly; when a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance*; for which reason *he takes upon himself*, according to JULIAN, *the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties* [a].

Where things are deposited through necessity on any sudden emergence, as a fire or a shipwreck, M. LE BRUN insists, “that the depositary
 “must answer for *less than gross* neglect, how
 “careless soever he may be in his own affairs;
 “since the preceding remark, that *a man, who*
 “*reposes confidence in an improvident person, must*
 “*impute any loss to his own folly*, is inapplicable
 “to a case, where the deposit was not optional;
 “and *the law ceases with the reason of it* [b];”
 but that is not the *only* reason; and, though it is
 an additional misfortune, for a man in extreme
 haste and deep distress to light upon a stupid or

[y] l. *Contractus*, 23. D. *de reg. jur.*

[z] Doct. and Stud. dial. 2. chap. 38.

[a] D. 16. 3. 1. 35.

[b] *De la Prestation des Fautes*, p. 77.

inattentive depositary, yet I can hardly persuade myself, that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at *Rome* by a forfeiture of the double value of the goods deposited.

In these circumstances, however, a benevolent offer of keeping another's property for a time would not, I think, bring the case within *Julian's* rule before-mentioned, so as to make the person offering answerable for *slight*, or even *ordinary*, negligence; and my opinion is confirmed by the authority of *LABEO*, who requires no more than *good faith* of a *negotiorum gestor*, when "affectu coactus, ne bona mea distrahantur, negotiis se meis obtulerit."

Thirdly; when the bailee, improperly called a *depositary*, either *directly* demands and receives a reward for his care, or takes the charge of goods in consequence of some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and lets out his mental labour at a just price: thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an inn-keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompense for their

H

attention

attention and pains; but of this more fully, when we come to the article of *hiring*.

Fourthly; when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the parties. Suppose, for example, that *Charles*, intending to appear at a masked ball expected to be given on a future night, requests *George* to lend him a dress and jewels for that purpose, and that *George*, being obliged to go immediately into the country, desires *Charles* to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, *deposits*, the exceptions to the general rule are reduced to two only; and the second of them, I conceive, will not be rejected by the *English* lawyer, although I recollect no decision or dictum exactly conformable to the opinion of *Julian*.

Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when

when it had been adjudged, consistently with common sense and common honesty, "that an action on the case lay against a man, who had not performed his promise of redelivering, or delivering over, things bailed to him," that judgement was *reversed*; and, in the sixth year of JAMES, judgement for the plaintiff was arrested in a case exactly similar [c]: it is no wonder, that the profession *grumbled*, as lord Holt says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established in the house of peers [d].

Among the curious remains of *Attick* law, which philologers have collected, very little relates to the contracts, which are the subject of this essay; but I remember to have read of DEMOSTHENES, that he was advocate for a person, with whom *three* men had deposited some valuable utensil, of which they were joint-owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence, that there was a *third* bailor, whom they had not joined in the suit; for, the truth not being proved, *Demosthenes* insisted, *that his client could not legally restore the deposit, unless all three pro-*

[c] Yelv. 4. 50. 128.

[d] 2 Cro. 667. *Wheatly and Low.*

prietors were ready to receive it; and this doctrine was good at *Rome* as well as at *Athens*, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall [e].

The obligation to return a deposit faithfully was, in very early times, holden sacred by the *Greeks*, as we learn from the story of *GLAUCUS*, who, on consulting the oracle, received this answer, "that it was criminal even "to harbour a thought of with-holding deposited "goods from the owners, who claimed them [f];" and a fine application of this *universal* law is made by an *Arabian* poet contemporary with *JUSTINIAN*, who remarks, "that life and wealth "are only deposited with us by our creator, and, "like all other deposits, must in due time be re-stored."

II. Employment by COMMISSION was also known to our ancient lawyers; and *BRACTON*, the best writer of them all, expresses it by the *Roman* word, *Mandatum*; now, as the very essence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commission* is also pretty generally applied to bailees, who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word *MANDATE* as appropriated in a limited sense to the species of bailment now before us;

[e] D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

[f] Herod. VI. 86. Juv. Sat. XIII. 199.

nor will any confusion arise from the common acceptation of the word in the sense of a judicial command or precept, which is in truth only a *secondary* and inaccurate usage of it. The great distinction then between one sort of *mandate* and a *deposit* is, that the former *lies in fefance*, and the latter, simply *in custody*: whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself, to use *a degree of diligence and attention adequate to the performance of his undertaking*, the omission of such diligence may be, according to the nature of the business, either *ordinary*, or *slight*, neglect; although a bailee of this species ought regularly to be answerable only for a violation of *good faith*. This is the common doctrine taken from the law of *ULPIAN*; but there seems, in reality, to be no exception in the present case from the general rule; for, since *good faith* itself obliges every man *to perform his actual engagements*, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor *omit* any thing, however inconsiderable, which the nature of the act requires [g]: nor will a want of ability

[g] Lord Raym. 910.

to perform the contract be any defence for the contracting party; for, though the law *exacts no impossible things*, yet it may justly require, that every man shall know his own strength, before he undertakes to do an act, and that, if he delude another by false pretensions to skill, he shall be responsible for any injury, that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or, its equivalent, *gross* neglect.

A distinction seems very early to have been made in our law between the *nonfessance*, and the *misfessance*, of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *bad not built it*, the

court gave judgement of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable [b]. However, in a subsequent reign, when a similar action was commenced against one WATKINS for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which chief justice *Babington* at length interrupted by ordering the defendant's counsel either to plead or to demur; but serjeant *Rolf* chose to plead specially, and issue was taken on a *discharge* of the agreement [i]. Justice *Martin* objected to the action, because no tort was alledged; and he persisted warmly in his opinion, which seems not wholly irreconcilable to that of his two brethren; for in the cases, which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that *Martin*, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meant, as justice *Cokain* and the chief justice seem to have understood him, that no such action would lie for *nonfesance*, even *though special damage had been stated*. His argument was, that the action before them *sounded in covenant*

[b] Yearb. 11 Hen. IV. 33.

[i] Yearb. 3 Hen. VI. 36. b. 37. a. Statb. Abr. tit. *Actions sur le cas*, pl. 20.

merely,

merely, and required a specialty to support it ; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained : he gave, indeed, an example of *misfeasance*, but did not controvert the instances, which were given by the other judges.

It was not alledged in either of the cases just cited, that the defendant was to receive *pay* for the *feasance* of his work ; but, since both defendants were described as *actually in trade*, it was not perhaps intended, that they were to work *for nothing* : I cannot however persuade myself, that there would have been any difference, had the promises been purely *gratuitous*, and had a special injury been caused by the breach of them. Suppose, for instance, that *Robert's* corn-fields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish ; and that, *Robert* informing his neighbour *Henry* of his intention speedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds : if, in this case, *Henry* neglect to do the work undertaken, “ and the water, not having its natural course, overflow the fields of “ *Robert* and spoil his corn,” may not *Robert* maintain his action on the case ? Most assuredly ; and so in a thousand instances of proper bailments

ments, that might be supposed; where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss, which he sustained [*k*]; for it is, as it ought to be, a general rule, that, for every *damnum injuriâ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet* [*l*]: but the *special* damage, not the assumption, is the cause of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it.

A case in *Brook*, made complete from the Year-book, to which he refers, *seems* directly in point; for, by chief justice FINEUX, *it had been adjudged*, that, “if a man assume to build a house
“for me by a certain day, and do not build it,
“and I suffer damage by his nonfessance, I shall
“have an action on the case, as well as if he
“had done it amiss:” but it is *possible*, that *Fineux* might suppose a consideration, though none be mentioned [*m*].

[*k*] Yearb. 19 Hen. VI. 49.

[*l*] D. 13. 6. 17. 3.

[*m*] Bro. Abr. tit. Action sur le Case, 72.

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature ; because it is very uncommon to undertake any office of trouble *without compensation* ; but, whether the case really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question “ whether a man was responsible for damage “ to certain goods occasioned by his negligence “ in performing a GRATUITOUS promise,” came before the court, in which lord *Holt* presided, so lately as the second year of queen ANNE ; and a point, which the first elements of the *Roman* law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in ENGLAND *to deserve*, what it certainly received, *very great consideration* [n].

The case was this : BERNARD had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff COGGS, a motion was made in arrest of judgment on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompense for his pains*, nor that he was a *common porter* : but the court were una-

[n] Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

nimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

The chief justice, as it has before been intimated [o], pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into *six* sorts, and gave a history of the principal authorities concerning each of them. This argument is justly represented by my learned friend, the annotator *on the First Institute*, as “a most masterly view of the whole subject of “bailment [p];” and, if my little work be considered merely as a commentary on it, the student may perhaps think, that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist, that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, *De pipâ vini cariandâ* [q], was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day,

[o] P. 35.

[p] Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

[q] Reg. Orig. 110. a. see also 110. b. *De equo infirmo sanando*, and *De columbari reparando*.

the year, and other circumstances; of which *Rastell* exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise, *without any consideration alleged*; and issue was joined on a traverse of the negligence and improvidence [r]. How any answer could have been given to these authorities, I am at a loss even to conceive: but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and supported with reasons no less cogent; for *nothing*, said Mr. Justice *Powell* emphatically, *is law, that is not reason*; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of *Titius* may, and frequently does, differ from the reason of *Septimius*, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many instances know what to advise, unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now the *reason* assigned by the learned judge for the cases in the *Register* and *Year-books*, which were the same with *Coggs* and *Bernard*, namely, “that the party’s *SPECIAL assumpsit* and “undertaking obliged him *so* to do the thing, “that the bailor came to no damage by his

[r] *Raft. Entr.* 13. b.

“neglect,”

"neglect," seems to intimate, that the omission of the words *salvò et securè* would have made a difference in this case, as in that of a *deposit*; but I humbly contend, that those words are implied, by the nature of a contract which lies in *respondeat*, agreeably to the distinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think, that the narrowness of the proposition in this instance affects the general doctrine, which I have presumed to lay down; and, in the strong case of the shepherd, *who had a flock to keep, which he suffered through negligence to be drowned*, neither a *reward* nor a *special* undertaking are stated [s]: that case, in the opinion of justice *Townsend*, depended upon the distinction between a bargain *executed* and *executory*; but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the nonrespondeat* [t].

There seems little necessity after this, to mention the case of *Powtuary* and *Walton*, the reason of

[s] Yearb. 2 Hen. VII. 11.

[t] Statb. Abr. tit. *Actions sur le cas*, pl. 11. By justice *Passon*, "si un ferroux face covenant ove moy
"de ferrer mon chival, jeo die qe fil ne ferra mon
"chival, uncore jeo averai accion sur mon cas, qar en
"son default peraventure mon chival est perie."

which

which applies directly to the present subject; and, though it may be objected that the defendant was stated as a *farrier*, and must be *presumed* to have acted *in his trade*, yet chief justice *Rolle* intimates no such presumption; but says expressly, that “an action on the case lies upon this matter, “*without alledging any consideration*: for the “*negligence* is the cause of action, and not the “*assumpsit* [u].”

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work*; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *special* acceptance: for instance, if *Stephen* desire *Philip* to carry a diamond-ring from *Bristol* to a person in *London*, and he put it *with bank-notes of his own* into a letter-case, out of which it is *stolen* at an inn, or seized by a robber on the road, *Philip* shall not be answerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to *Stephen*: every thing, therefore, that has been

[u] 1 Ro. Abr. 10.

expounded

expounded in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species.

Since we have nothing in these cases analogous to the judgements of *infamy*, which were often pronounced at *Rome* and *Athens*, it is hardly necessary to add, what appears from the speech of *CICERO* for *S. Roscius of Ameria*, that “the ancient *Romans* considered a mandatary as infamous, if he broke his engagement, not only by actual *fraud*, but even by *more than ordinary negligence* [w].”

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatary is responsible, almost all, that has been advanced before in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and *without his knowledge*, is the *negotiorum gestor* of the civilians, and the obligation resulting from his implied contract has been incidentally mentioned in a preceding page.

[w] “In privatis rebus, si quis rem *mandatam* non modo *malitiosius* gessisset, sui quaestus aut commodi causâ, verum etiam *negligentius*, cum majores summum admisisset dedecus existimabant: itaque *mandati* constitutum est judicium, non minus turpe quam *furti*.” Pro S. Rosc. p. 116. *Glasg.*

III. On the third species of bailment, which is one of the most usual and most convenient in civil society, little remains to be observed; because our own, and the Roman, law are on this head perfectly coincident. I call it, after the *French* lawyers, *loan for use*, to distinguish it from their *loan for consumption*, or the *MUTUUM* of the *Romans*; by which is understood the lending of money, wine, corn, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity [x]: this latter contract, which, according to St. GERMAN, is most properly called a *loan*, does not belong to the present subject; but it may be right to remark, that, as the *specifick* things are not to be returned, the *absolute* property of them is transferred to the borrower, who must bear the loss of them, if they be destroyed by wreck, pillage, fire, or other inevitable misfortune.

[x] Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from *Bracton* is cited by the chief justice, *mutuam* is printed for *commodatam*; but what then can be made of the words *ad IPSAM restituendam*? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to *Tattel's* edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from *Justinian*, whom *Bracton* copied: "At is, qui *mutuum* accepit, obligatus remanet," si forte incendio, &c. *Inst.* 3. 13. 2.

Very

Very different is the nature of the bailment in question; for a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought to be redelivered *specifically*; and the owner must abide the loss, if they perish through any accident, which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, “which the law, says the rule, never demands;” for that maxim relates merely to things *absolutely* impossible; and it was not only *very possible*, but *very expedient*, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care, than that of which *such* a person was capable; as, if *Paul* lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection, which he would expect from a riding-master or an officer of dragoons [y].

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction

[y] *Dumoulin*, tract. *De eo quod interest*, n. 185.

K.

before

before made between simple *theft* and *robbery* [z], it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove, that they were purloined notwithstanding his *extraordinary* care. The example, given by *Julian*, is the first and best that occurs: *Caius* borrows a silver ewer of *Titius*, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, *Caius* appears to be wholly blameless, and *Titius* has suffered *damnum sine injuriâ*. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the *principal* thing bailed, must be extended to such *accessory* things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Although the laws of *Rome*, with which those of *England* in this respect agree, most expressly decide, that a borrower, using more than ordinary diligence, *shall not be chargeable, if there be a force which he cannot resist* [a], yet PUFENDORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion; namely, “that the borrower ought

[z] See p. 44. and note [o].

[a] D. 44. 7. 1. 4. Ld. Raym. 916.

“ to indemnify the lender, if the goods lent be
“ destroyed by fire, shipwreck, or other in-
“ evitable accident, and *without his fault*, unless
“ *his own* perish with them :” for example, if
Paul lend *William* a horse worth thirty guineas
to ride from *Oxford* to *London*, and *William*
be attacked on a heath in that road by high-
waymen, who kill or seize the horse, he is
obliged, according to *Pufendorf* and his anno-
tator, to pay thirty guineas to *Paul*. The
justice and good sense of the contrary decision are
evinced beyond a doubt by M. POTHIER, who
makes a distinction between those cases, where
the loan was the *occasion* merely of damage to
the lender, who might in the mean time have
sustained a loss from other accidents, and those,
where the loan was the sole efficient *cause* of his
damage [*b*]; as if *Paul*, having *lent* his horse,
should be forced in the interval by some pressing
business to *hire* another for himself ; in this case
the borrower ought, indeed, to pay for the hired
horse, unless the lender had voluntarily submitted
to bear the inconvenience *caused* by the loan ;
for, in this sense and in this instance, *a benefit*
conferred should not be injurious to the benefactor.
As to a condition *presumed* to be imposed by the
lender, that he would not abide by any loss *oc-*
casioned by the lending, it seems the wildest and
most unreasonable of presumptions : if *Paul*
really intended to impose such a condition, he

[*b*] Poth. *Prêt à Usage*, n. 55. *Puf.* with *Bar-*
beyrac's notes, B. 5. C. 4. § 6.

should have declared his mind; and I persuade myself, that *William* would have declined a favour so hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unreasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case, cited by *St. German* from the *Summa Rosella*, where a loan must be meant, though the word *depositum* be erroneously used [c]; and it is there decided, that, if the borrower of a horse will imprudently ride by a ruinous house in manifest danger of falling, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were in good condition and fell by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger, reason, if *William*, instead of coming to *London*, for which purpose the horse was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident, that may befall the horse in his journey to *Bath*, or after the expiration of the week [d].

[c] *Doct. and Stud.* where before cited.

[d] *Ld. Raym.* 915.

Thus,

Thus, if *Charles*, in a case before put [*e*], wear the masked habit and jewels of *George* at the ball, for which they were borrowed, and be *robbed* of them in his return home at the usual time and by the usual way, he cannot be compelled to pay *George* the value of them; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by *Gaius* in the digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of *Caius* be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer, which he had borrowed of *Titius*, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay *Titius*

[*e*] P. 50.

the

the value of that, which he has lost ; unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and *Caius* had time only to snatch up the first utensil, that presented itself.

Since openness and honesty are the soul of contracts, and since “ a suppression of truth is often “ as culpable as an express falsehood,” I accede to the opinion of *M. Potbier*, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were to conceal from him, that his own horse was as fit for the service, and if the horse, so borrowed, were slain in the engagement, the lender ought to be indemnified ; for probably the dissimulation of the borrower induced him to lend the horse ; but, had the soldier openly and frankly acknowledged, that he was unwilling to expose his own horse, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the *Roman* expression, be IN MORA, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens after the demand ; unless in cases, where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time ; or, unless the bailee have legally
tendered

tendered the thing, and the bailor have put himself *in morâ* by refusing to accept it: this rule extends of course to every species of bailment.

“Whether, in the case of a *valued loan*, or, “where the goods lent are *estimated at a certain price*, the borrower must be considered as “bound *in all events* to restore either the things “lent or the value of them,” is a question, upon which the civilians are as much divided, as they are upon the celebrated clause in the law *Contractus*: five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament. *D’Avezan* supports the affirmative; and *Pothier*, the negative; but the second opinion seems the more reasonable. The word *PERICULUM*, used by *Ulpian*, is in itself equivocal: it means *bazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the *Roman* lawyer in the passage, which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the *Customary Provinces* of *FRANCE*, or in *ENGLAND*, a borrower can be chargeable for all events *without his consent unequivocally given*: if *William*, indeed, had said to *Paul* alternatively, “I promise, on my return to *Oxford*, “either to restore your horse or to pay you thirty “guineas,” he must *in all events* have performed

one part of this disjunctive obligation [*f*]; but, if *Paul* had only said, “the horse, which I lend you for this journey, is fairly worth thirty guineas,” no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence, which the nature of the contract required.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use, in which the lender has a *common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if *Stephen* and *Philip* invite some common friends to an entertainment prepared at their joint expense, for which purpose *Philip* lends a service of plate to his companion, who undertakes the whole management of the feast, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper loan.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as, if a passionate lover of

[*f*] Palm. 551.

musick

musick were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a *loan*, as a *mandate*; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the instrument, and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss, and a brother-musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with DESPEISSES, a learned advocate of *Montpellier* and writer on *Roman law*, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of MOSES, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence*, of the OWNER; for, says the divine legislator, “if a
“man borrow aught of his neighbour, and it
“be hurt or die, *the owner thereof not being with*
“*it*, he shall surely make it good; but, if the
“*owner thereof be with it*, he shall *not* make it
“good[g]:” now it is by no means *certain*,

[g] Exod. xxii. 14, 15.

L

that

that the original word signifies the *owner*, for it may signify the *possessor*, and the law may import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed ; but, if it was intended, that the borrower should always answer for casualties, *except in the case*, which must rarely happen, of *the owner's presence*, this exception seems to prove, that no casualties were meant, but such as *extraordinary* care might have prevented ; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old *Athenian* law is preserved by *Demosthenes*, from which little can be gathered on account of its generality and the use of an ambiguous word [*b*] : it is understood by *Petit* as relating to guardians, mandataries, and commissioners ; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

[*b*] Περὶ ᾧ καθυφῆκε τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. *Reiske's* edition, 855. 3. Here the verb καθυφιέναι may imply *flight*, or *ordinary*, neglect ; or even *fraud*, as *Petit* has rendered it.

IV. As

IV. As to the degree of diligence, which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir-Edward Coke, with whose opinion a similar liberty has before been taken in regard to a *depository*; for that very learned man lays it down, that, “if goods be delivered to one as a *gage* or *pledge*, and they be *stolen*, he shall be discharged, because *he hath a property* in them; and, *therefore*, he ought to keep them *no otherwise than his own* [i]: I deny the first proposition, the reason, and the conclusion.

Since the bailment, which is the subject of the present article, is beneficial to the *pawnee* by securing the payment of his debt, and to the *pawnor* by procuring him credit, the rule, which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person, to whom a *gage* or *pledge* is bailed, to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect [k]. This is expressly holden by BRACTON; and, when I rely on his authority, I am perfectly aware, that he copied *Justinian* almost word for word, and that lord Holt, who makes considerable use of his treatise, observes three or four times, “that he was an *old* author [l];” but, although he had been a civilian, yet he was also a

[i] 1 Inst. 89. a. 4 Rep. 83. b.

[k] Bract. 99. b.

[l] Ld. Raym. 915. 916. 919.

great common-lawyer, and never, I believe, adopted the rules and expressions of the *Romans*, except when they coincided with the laws of *England* in his time: he is certainly the *best* of our juridical classicks; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine in question has the full assent of lord *Holt* himself; who declares it to be “*sufficient*, if the pawnee use *true*, “and *ordinary*, diligence for restoring the goods, “and that, so doing, he will be indemnified, “and, notwithstanding the loss, shall resort to “the pawnor for his debt.” Now it has been proved, that “a bailee cannot be considered as “using *ordinary* diligence, who suffers the goods “bailed to be taken by *stealth* out of his “custody [*m*];” and it follows, that “a pawnee “shall *not* be discharged, if the pawn be simply “*stolen* from him;” but if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the *Roman* institutes, which *Bracton* has nearly transcribed, by no means convinces M. LE BRUN, that a *pawnee* and a *borrower* are not responsible for *one and the same*

[*m*] P. 44. note [*o*].

degree

degree of negligence; and it is very certain, that *Ulpian*, speaking of the *Actio pignoratitia*, uses these remarkable words: “ Venit in *hac* actione “ et *dolus* et *culpa* UT in *commodato*, venit et “ custodia; vis major non venit.” To solve this difficulty, *Noodt* has recourse to a conjectural emendation, and supposes UT to have been inadvertently written for AT; but, if this was a mistake, it must have been pretty ancient, for the *Greek* translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occasion for so hazardous a mode of criticism. *Ulpian* has not said, “ *talis* “ culpa *qualis* in *commodato* ;” nor does the word UT imply an *exact* resemblance: he meant, that a pawnee was answerable for *neglect*, and gave the first instance, that occurred, of another contract, in which the party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions *PIGNUS* among other contracts *reciprocally useful*, and distinguishes it from *COMMODATUM*, whence the borrower *solely* derives advantage [n].

It is rather less easy to answer the case in the book of *Affise*, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system [o]; for there,

[n] Before, p. 16.

[o] 29 Aff. pl. 28.

in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him *in* " *gage* for a certain sum of money; that he had " put it among his other goods; and that all together had been *stolen* from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, "that he *tendered* the money before the *stealing*, " and that the creditor refused to accept it," on which fact issue was joined; and the reason, assigned by the chief justice, was, that, "if a man " bail goods to me *to keep*, and I put them " among my own, I shall not be charged, if they " be *stolen*." To this case I answer: first, that, if the court really made no difference between a *pawnee* and a *depository*, they were indubitably mistaken; for which assertion I have the authority of *Bracton*, lord *Holt*, and *St. German*, who ranks the taker of a *pledge* in the same class with a *hirer* of goods [*p*]; next, that in a much later case, in the reign of Hen. VI., where a *hiring of custody* seems to be meant, the distinction between a *theft* and a *robbery* is taken agreeably to the *Roman* law [*q*]; and, lastly, that, although in the strict propriety of our *English* language, to *steal* is to take *clandestinely*, and to *rob* is to seize by *violence*, corresponding with the *Norman* verbs *embleer* and *robber*, yet those words are sometimes

[*p*] Doct. and Stud. *dial* 2. *ch.* 38.

[*q*] Before, p. 44. note [*o*].

used inaccurately; and I always suspected, that the case in the book of *Affise* related to a robbery, or a taking *with force*; a suspicion confirmed beyond any doubt by the judicious *Brook*, who abridges this very case with the following title in the margin, “*Que ferra al perde, quant les biens sont robbes [r]* :” and, in a modern work, where the old cases are referred to, it appears to have been settled, in conformity to them and to reason, “that if the pawn be laid up, and the pawnee be *robbed*, he shall not be answerable [s] : but lord *Coke* seems to have used the word *stolen* in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, the whole property is instantly *revested* in the *pledgor*, and he may consequently maintain an action of *trover* [t] : it is said in a most useful work, that by such tender and refusal the thing pawned “ceases to be a pledge and becomes a *deposit* [u] ;” but this must be an error of impression; for there can never be a *deposit* without the owner’s consent, and a *depository* would be chargeable only for

[r] *Abr. tit. Bailment*, pl. 7.

[s] 2 *Salk.* 522.

[t] 29 *Aff.* pl. 28. *Yelv.* 179. *Ratcliff and Davis.*

[u] *Law of Nisi Prius*, 72.

gross negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or to relinquish his debt [w].

The reason, given by *Coke* for his doctrine, namely, "because the pawnee has a *property* in "the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species; for every bailee has a temporary *qualified* property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger, who may damage or purloin them [x]. By the *Roman* law, indeed, "even the possession of the "depositary was holden to be that of the person "depositing;" but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care: he may not, however, *use* them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling, that the dog should be used for partridge-shooting, and thus be confirmed in

[w] *Ld. Raym.* 917.

[x] *Yearb.* 21 *Hen. VII.* 14. b. 15. a.

those

those habits, which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine, that he would suffer them to be worn; and, on the other hand, it may justly be inferred, that he would gladly indulge *Titius* in the liberty of using the *books*, of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be *impaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a publick place, and be *robbed* of them on her return, she must make them good: “if she keep them in a bag,” says a learned and respectable writer, “and they are *stolen*, she shall “not be charged [y];” but the bag could hardly be taken *privately and quietly* without her omission of *ordinary* diligence; and the manner, in which lord *Holt* puts the case, establishes my system, and confirms the answer just offered to the case from the Year-book; for, “if she keep the “jewels, says he, *locked up* in her cabinet, and “her cabinet be *broken open*, and the jewels

[y] Law of *Nisi Prius*, 72.

M

“taken

“taken thence, she will not be answerable [z].”
 Again; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge [a]; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges of their nourishment [b]. It follows from these remarks, that lord *Coke* has assigned an inadequate reason for the degree of diligence, which is demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him.

But, if the receiver in pledge *were* the only bailee, who had a *special property* in the thing bailed, it could not be logically inferred, “that, “*therefore*, he ought to keep it merely *as his own* :” for, even if *Caius* have an *absolute* undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well as positive, law

[z] Ld. Raym. 917.

[a] Ow. 124.

[b] Poth. *Dépôt*, n. 47. *Nantissement*, n. 35.

to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use *ordinary* diligence in affairs, which interest *another* as well as himself: "*Aliena negotia,*" says the emperor CONSTANTINE, "*exacto officio*" "*geruntur [c].*"

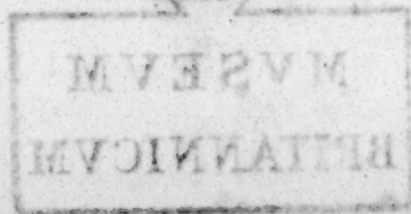
The conclusion, therefore, drawn by Sir *Edward Coke*, is no less illogical than his premisses are weak; but here I must do M. *Le Brun* the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of *English* law; namely, that a person, who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was *Le Brun's* hypothesis, he has done little more than adopt the system of *Godefroi*, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity: they were used in very early times by the roving *Arabs*, one of whom finely remarks, "that the "life of Man is no more than a *pledge* in the "hands of Destiny;" and the salutary laws of *MOSES*, which forbade certain implements of husbandry and a widow's raiment to be given

[c] C. 4. 35. 21.

M12

in



in pawn, deserve to be imitated as well as admired. The distinction between *pledging*, where possession is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attick*; but scarce any part of the *Athenian* laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of *Demosthenes*.

I cannot end this article, without mentioning a singular case from a curious manuscript preserved at *Cambridge*, which contains a collection of queries in *Turkish*, together with the decisions or concise answers of the MUFTI at *Constantinople*: it is commonly imagined, that the *Turks* have a translation in their own language of the *Greek* code, from which they have supplied the defects of their *Tartarian* and *Arabian* jurisprudence [*d*]; but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded, that their numerous treatises on *Mahomedan* law are worthy on many accounts of an attentive examination. The case was this: “*Zaid* had
“ left with *Amru* divers goods in pledge for a cer-
“ tain sum of money, and some *ruffians*, having
“ entered the house of *Amru*, took away his own
“ goods together with those pawned by *Zaid*.”
Now we must necessarily suppose, that the creditor had by *his own fault* given occasion to this robbery; otherwise we may boldly pronounce,

[*d*] *Duck de Auth. Jur. Civ. Rom. I. 2. 6.*

that



that the *Turks* are wholly unacquainted with the imperial laws of *Byzantium*, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, "whether, *since* " *the debt became extinct by the loss of the pledge,* " and since the goods pawned exceeded in " value the amount of the debt, *Zaid* could legally demand the balance of *Amru*;" to which question the great law-officer of the *Othman* court answered with the brevity usual on such occasions, *OLMAZ, It cannot be*[e]. This custom, we must confess, of proposing cases both of law and conscience under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality and to save the charges of litigation.

V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

1. *Locatio*, or *locatio-conductio*, *REI*, is a contract, by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price, of the hiring; so that, in truth, it bears a

[e] Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. *Hywel Dda.* lib. 2. cap. 2. § 29. note x. It may possibly be the usage in *Turky* to stipulate "ut " *amissio pignoris liberet debitorem*," as in C. 4. 24. 6. strong

strong resemblance to the contract of *emptio-venditio*, or SALE; and, since it is advantageous to *both* contracting parties, the harmonious consent of nations will be interrupted, and one object of this essay defeated, if the laws of *England* shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication, that I have read on any legal subject, it is expressly said, “that the hirer is to take *all imaginable* care of the goods delivered for hire [f]:” the words *all imaginable*, if the principles before established be just, are too strong for practice even in the strict case of *borrowing*; but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of lord *Holt* in the case of *Coggs and Bernard*, where the great judge lays it down, “that, if goods are let out for a *reward*, the *hirer* is bound to the *utmost* diligence, such as the most *diligent father of a family* uses [g].” It may seem bold to controvert so respectable an opinion; but, without insisting on the palpable injustice of making a *borrower* and a *hirer* answerable for precisely the *same* degree of neglect, and without urging, that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the chief justice was entirely

[f] Law of *Nisi Prius*, 3d edition corrected, 72.

[g] Ld. Raym. 916.

grounded on a grammatical mistake in the translation of a single *Latin* word.

In the first place, it is indubitable, that his lordship relied *solely* on the authority of *Bracton*; whose words he cites at large, and immediately subjoins, "*whence it appears, &c.*" now the words, "*talis ab eo desideratur custodia, qualem*" "*DILIGENTISSIMUS paterfamilias suis rebus ad-*" "*hibet,*" on which the whole question depends, are copied exactly from *Justinian* [b], who informs us in the *proeme* to his *Institutes*, that his decisions in that work were extracted *principally from the Commentaries of GAIUS*; and the epithet *diligentissimus* is in fact used by this ancient lawyer [i], and by him alone, on the subject of hiring: but *Gaius* is remarked for writing with energy, and for being fond of using *superlatives*, where all other writers are satisfied with *positives* [k]; so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words *Theophilus* rendered more than literally, and *Bracton* transcribed; and thus an epithet, which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the *pandects* with the *institutes*, which, together with the *codes*,

[b] Bract. 62. b. Justin. Inst. 3. 25. 5. where *Theophilus* has *ὁ σφόδρα ἐπιμελής αὐτός*.

[i] D. 19. 2. 25. 7.

[k] Le Brun, p. 93.

form *one connected work* [l], and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who imagines, that both *Justinian* and *Gaius* are speaking only of cases, which *from their nature* demand *extraordinary* care [m].

There is no authority then against the rule, which requires of a *hirer* the same degree of diligence, that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods; and the just distinction between *borrowing* and *hiring*, which the *Jewish* lawgiver emphatically makes, by saying, “if it be an hired “thing, *it came for its hire* [n],” remains established by the concurrent wisdom of nations in all ages.

If *Caius* therefore hire a horse, he is bound to ride it as moderately and treat it as carefully, as any man of *common discretion* would ride and treat *his own* horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not, if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road: if, indeed, he hire a carriage and any number of horses, and the

[l] Burr. 426.

[m] *Inst.* vol. V. p. 138.

[n] *Exod.* xxii. 15.

owner send with them his postilion or coachman, *Caius* is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glassess and inside of the carriage, while he sits in it.

Since the negligence of a servant, *acting under his master's directions express or implied*, is the negligence of the master, it follows, that, if the servant of *Caius* injure or kill the horse by riding it immoderately, or, by leaving the stable-door open, suffer thieves to steal it, *Caius* must make the owner a compensation for his loss [o]; and it is just the same, if he take a ready-furnished lodging, and his guests, or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At *Rome* the law was not quite so rigid; for *Pomponius*, whose opinion on this point was generally adopted, made the master liable, only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have known [p]: but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those, whom he receives or employs, compels him to keep a vigilant eye on all his domesticks, is not only more simple, but more conducive to the publick security, although it may be rather harsh

[o] Salk. 282. Ld. Raym. 916.

[p] D. 19. 2. 11.

in some particular instances [q]. It may here be observed, that this is the only contract, to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb *bailler*, to deliver; and, though the contracts, which are the subject of this essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use, if the orchard, garden, or farm, were his own.

2. *Locatio OPERIS*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important [r].

If

[q] Poth. *Locage*, n. 193.

[r] It may be useful to mention a nicety of the *Latin* language in the application of the verbs *locare* and *conducere*: the employer, who gives the reward,

If *Titius* deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their several undertakings in a workmanly manner [s]: but, *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be sent to pasture by the owner's desire, the innholder is not, *as such*, responsible for the loss of

is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. HEINECC. in *Pand.* par. 3. § 320. So, in *Horace*,

“ Tu fecanda marmora

“ *Locas*”—

which the stonehewer or mason *conduxit*.

[s] 1 Ventr. 268. erroneously printed 1 Vern. 268. in all the editions of *Bl. Comm.* II. 452. The innumerable multitude of inaccurate or idle references, in our best reports and law-tracts, is the bane of the student and of the practiser.

him by *theft* or accident [*t*]; and, in the case of *Mosley* and *Fosset*, an action against an agister for keeping a horse *so negligently that it was stolen*, is said to have been held maintainable *only* by reason of a *special* assumption [*u*]; but the case is differently reported by *Rolle*, who mentions no such reason; and, according to him, chief justice *Popham* advanced generally, in conformity to the principles before established, that, “if a man, to whom horses are bailed for agistment, *leave open the gates of his field*, in consequence of which neglect they stray and are *stolen*, the owner has an action against him:” it is the same, if the innkeeper send his guest’s horse to a meadow *of his own accord*, for he is bound to keep safely all such things as his guests deposit *within his inn*, and shall not discharge himself by his own act from that obligation; and, even when he turns out the horse *by order of the owner*, and receives pay for his grass and care, he is chargeable, surely, for *ordinary* negligence, as a *bailee for hire*, though not as an *innkeeper* by the general custom of the realm. It may be worth while to investigate the reasons of this *general custom*, which in truth means no more than *common law*, concerning innholders [*w*].

Although a stipend or reward in *money* be the essence of the contract called *locatio*, yet the

[*t*] 8 Rep. 32. *Calye’s case*.

[*u*] Mo. 543. 1 Ro. Abr. 4.

[*w*] Reg. Orig. 105. a. Noy, Max. ch. 43.

same

same responsibility for neglect is justly demanded in any of the *innominate* contracts, or, whenever a valuable consideration of any kind is given or stipulated. This is the case, where the contract *do ut des* is formed by a *reciprocal bailment for use*, as if *Robert* permit *Henry* to use his *pleasure-boat* for a day, in consideration that *Henry* will give him the use of his *chariot* for the same time; and so in ten thousand instances, that might be imagined, of *double bailments*: this too is the case, if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if *Charles* give *George* a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des*; and, in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserving the things, with which they are intrusted: so, when *Jacob* undertook the care of *Laban's* flocks and herds for no less a reward than his younger daughter, whom he

he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant, as if he had been paid in shekels of silver.

Now the obligation is precisely the same, as we have already hinted [x], when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract*; and, though an innholder be not paid in money for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be considered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius* and, as great a man as he, lord *Holt*, seem to view the obligation; for they agree, "that, although a bargeman and a master of a ship
"receive their fare for the passage of travellers,
"and an innkeeper his pay for the accommodation and entertainment of them, but have no
"pecuniary reward for the *mere custody* of the
"goods belonging to the passengers or guests,
"yet they are obliged to take *ordinary* care of
"those goods; as a fuller and a mender are
"paid for their *skill only*, yet are answerable, *ex*
"locato, for *ordinary* neglect, if the clothes be
"lost or damaged [y]."

[x] P. 49, 50.

[y] D. 4. 9. 5. and 12 Mod. 487.

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee than the care, which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it*, *By any person whatever* [z]; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, *because there are suspected persons in the house, for whose conduct he cannot be answerable* [a]: it is otherwise, indeed, if he refuse admission to a traveller, because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent [b].

Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the publick, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests, who sleep in his chambers [c]. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great princi-

[z] Yearb. 10 Hen. VII. 26. 2 Cro. 189.

[a] Mo. 78.

[b] Dy. 158. b. 1 And. 29.

[c] 1 Bl. Comm. 430.

ple of publick utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to POMPONIUS, *his desire of securing the publick from the dishonesty of such men*, and by his *edict* gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident*; and Ulpian intimates, that even this severity could not restrain them from knavish practices or suspicious neglect [d].

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary care*, or that the *force*, which occasioned the loss or damage, was truly *irresistible*.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiae*, and might have

[d] D. 4. 9. 1. and 3.

been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he *lets out* for pay, are in truth a mental *operation*. Whatever be his appellation, either in *English* or *Latin*, he is clearly responsible, like other interested bailees, for *ordinary negligence*; and, although *St. German* seems to make no difference in this respect between a *keeper of goods for hire* and a *simple depositary*, yet he uses the word *DEFAULT*, like the *CULPA* of the *Romans*, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law [e].

In the sentence immediately following, he makes a very material distinction between the two contracts; for, “if a man, says he, have
“*a certain recompense* for the keeping of goods,
“and promise, at the time of the delivery, *to*
“*redeliver them safe at his peril*, then he shall be
“charged with *all chances*, that may befall;
“but, if he make *that* promise, and *have nothing*
“for keeping them, he is bound to *no casualties*, but such as are wilful, and happen
“*by his own default* :” now the word *PERIL*, like *periculum*, from which it is derived, is in itself ambiguous, and sometimes denotes the *risk of inevitable mischance*, sometimes the *danger*

[e] *Doct.* and *Stud.* where before cited.

arising from a want of due circumspection; and the stronger sense of the word was taken in the first case against him, who uttered it; but, in the second, where the construction is favourable, the milder sense was justly preferred [f]. Thus, when a person, who, if he were wholly uninterested, would be a *mandatary*, undertakes for a reward to perform any work, he must be considered as bound still more strongly, to use a degree of diligence adequate to the performance of it: his obligation must be rigorously construed, and he would, perhaps, be answerable for slight neglect, where no more could be required of a *mandatary* than ordinary exertions. This is the case of commissioners, factors, and bailiffs, when their undertaking lies in *fesance*, and not simply in *custody*: hence, as peculiar care is demanded in removing and raising a fine column of granate or porphyry, without injuring the shaft or the capital, *Gaius* seems to exact more than ordinary diligence from the undertaker of such a work for a stipulated compensation [g]. Lord Coke considers a factor in the light of a *servant*, and thence deduces his obligation; but, with great submission, his reward is the true reason, and the nature of the business is the just measure, of his duty [h]; which cannot, however, extend to a responsibility for mere accident

[f] See before, p. 45.

[g] D. 19. 2. 7.

[h] 4 Rep. 84. Ld. Raym. 918.

or *open robbery* [i]; and, even in the case of *theft*, a factor has been holden excused, when he showed, “ that he had *laid up* the goods of “ his principal in a warehouse, out of which they “ were *stolen* by certain malefactors to him unknown [k].”

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a *due application of the necessary art*: it is his own fault, if he undertake a work above his strength; and all, that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi* [l]. I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man, who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability [m]. The case, which SADI relates with elegance and humour in his *Gulistan* or *Rose-garden*, and which *Pufendorf* cites with approbation [n], is not inapplicable to the present subject, and may serve as a

[i] 1 Inst. 89. a.

[k] 1 Vent. 121. *Vere* and *Smith*.

[l] *Spondet*, say the *Roman* lawyers, *peritiam artis*.

[m] P. 54.

[n] *De Jure Nat. et Gent.* lib. 5. cap. 5. § 3.

specimen of *Mahomedan law*, which is not so different from ours, as we are taught to imagine :
 ‘ A man, who had a disorder in his eyes, called
 ‘ on a *farrier* for a remedy ; and he applied to
 ‘ them a medicine commonly used for *his* pa-
 ‘ tients : the man lost his sight, and brought an
 ‘ action for damages ; but the judge said, “ No
 “ action lies, for, if the complainant had not
 “ himself been an *afs*, he would never have em-
 “ ployed a *farrier* ;” and *Sadi* proceeds to inti-
 mate, that, “ if a person will employ a common
 “ *mat-maker* to weave or embroider a *fine carpet*,
 “ he must impute the bad workmanship to his
 “ own folly [*o*].”

In regard to the distinction before-mentioned between the *nonfance* and the *misfance* of a workman [*p*], it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly *implied* ; of which BLACKSTONE gives

[*o*] Rosar. Polit. cap. 7. There are numberless tracts in *Arabick*, *Persian*, and *Turkish*, on every branch of jurisprudence ; from the best of which it would not be difficult to extract a complete system, and to compare it with our own ; nor would it be less easy, to explain in *Persian* or *Arabick* such parts of our *English* law, as either coincide with that of the *Asiatics*, or are manifestly preferable to it.

[*p*] P. 54, &c.

the

the following instance : “ If a *builder* promises, “ undertakes, or assumes to *Caius*, that he will “ build and cover his house within a time limited, and fails to do it, *Caius* has an action “ on the case against the builder for this breach “ of his express promise, and shall recover a “ pecuniary satisfaction for the injury sustained “ by such delay [q].” The learned author meant, I presume, a *common* builder, or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *nonperformance* of a *mandatary* [r].

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether *locator rei* or *conductor operis*, must be supposed to know, that the goods and chattels of his bailor are in *many* cases *distrainable* for rent, if his landlord, who might otherwise be shamefully defrauded, find them on the premises [s]; and, as they cannot be distrained and sold without his *ordinary* default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss [t]: even if a *depository* were to remove or conceal *his own* goods, and those of his depositor were to be seized for rent-arriere, he would unquestionably be bound to make re-

[q] 3 Comm. 157.

[r] P. 56, 57. 61.

[s] Burr. 1498. &c.

[t] 3 Bl. Comm. 8.

stitution; but there is no obligation in the bailor to suggest wise precautions against inevitable accident; and he cannot, therefore, be obliged to advise insurance from fire; much less to insure the things bailed without an authority from the bailor.

It may be right also to mention, that the distinction, before taken in regard to loans [u], between an obligation to restore the *specifick* things, and a power or necessity of returning others equal in value, holds good likewise in the contracts of *hiring* and *depositing*: in the first case, it is a regular *bailment*; in the second, it becomes a *debt*. Thus, according to ALFENUS in his famous law, on which the judicious *Bynkershoek* has learnedly commented, “if an ingot of silver be delivered to a silver-smith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape [w]:” the smith may consequently apply it to his own use; but, if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed

[u] P. 64, 65.

[w] D. 19. 2. 31. Bynk. Obs. Jur. Rom. lib. VIII.

to be *specifically* redelivered in the form of a cup or a standish.

3. *Locatio operis* MERCUM VEHENDARUM is a contract, which admits of many varieties in form, but of none, as it seems *at length* to be settled, in the *substantial* obligations of the bailee.

A carrier for hire ought, by the rule, to be responsible only for *ordinary* neglect; and, in the time of HENRY VIII., it appears to have been generally holden, "that a *common* carrier was "chargeable, in case of a loss by *robbery*, only "when he had travelled by *ways dangerous for* "robbing, or driven by *night*, or at any *incon-* "venient hour [x]:" but, in the commercial reign of ELIZABETH, it was resolved, upon the same broad principles of policy and convenience, that have been mentioned in the case of innholders, "that, if a *common* carrier be robbed of "the goods delivered to him, he shall answer "for the value of them [y]."

Now the *reward* or *hire*, which is considered by Sir Edward Coke as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force*; and, though some other bailees have a *recompense*, as *factors* and *workmen*

[x] Doct. and Stud. where often before cited.

[y] 1 Inst. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodliffe and Curties.

for pay, yet, even in *Woodlief's* case, the chief justice admitted, that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier*: the true ground of that resolution is the *publick employment* exercised by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of society [z].

The modern rule concerning a *common carrier* is, that “nothing will excuse him, except *the act of God*, or of *the King's enemies* [a];” but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not, *regularly*, for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence, or unavoidable *misfortune*; but the great maxims of policy and good government make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the *Act of God*, which the ancients too called *Θεῶν ἰσχύς* and *Vim divinam*, be an expression, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent,

[z] *Ld. Raym.* 917. 12 *Mod.* 487.

[a] *Law of Nisi Prius*, 70, 71.

to substitute in its place *inevitable accident*: religion and reason, which can never be at variance without certain injury to one of them, assure us, that “not a gust of wind blows, nor a flash of lightning gleams, without the knowledge and guidance of a superintending mind;” but this doctrine loses its dignity and sublimity by a technical application of it, which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, “that the ship was tight, when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed [b];” but the true reason of this decision is not mentioned by the reporter: it was in fact *at least ordinary* negligence, to let a rat do such mischief in the vessel; and the Roman law has, on this principle, decided, that, “*si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere* [c].”

Whatever doubt there may be, among civilians and common-lawyers, in regard to a *casket*, the contents of which are concealed from the

[b] 1 Wils. part 1. 281. Dale and Hall.

[c] D. 19. 2. 13. 6.

DEPOSITARY [d], it seems to be generally understood, that a *common carrier* is answerable for the loss of a box or parcel, be he ever so *ignorant of its contents*, or be those contents ever so valuable, *unless* he make a *special* acceptance [e]: but *gross fraud and imposition* by the bailor will deprive him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no personal communication, the bailee may be considered as a *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in *Ventris*, *Alleyne*, and *Carthew*, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the *reward*, and too little on the important motives of *publick utility*, which alone distinguish a *carrier* from other *bailees for hire* [f].

Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a *common boyman*, like a common *waggoner*, is responsible for goods committed to his

[d] Before, p. 37, 38, 39.

[e] 1 Stra. 145. *Titchburn and White*.

[f] Burr. 2298. *Gibbon and Paynton*. See 1 Vent. 238. All. 93. *Carth.* 485.

custody, even if he be *robbed* of them [g]; but the reason said to have been given for this judgement, namely, because *he had his hire*, is not the true one; since, as we have before suggested, the *recompense* could only make him liable for *temerity* and *imprudence*, as if a bargemaster were rashly to shoot a bridge, *when the bent of the weather is tempestuous*; but not for a *mere casualty*, as if a hoy in good condition, shooting a bridge at a proper time, were driven against a pier by a sudden breeze, and overset by the violence of the shock [b]; nor, by parity of reason, for any other force too great to be resisted [i]: the *publick* employment of the *boyman*, and that *dis-trust*, which an ancient writer justly calls the *sinew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

All, that has just been advanced concerning a *land-carrier*, may, therefore, be applied to a *bargemaster* or *boatman*; but, in case of a tempest, it may sometimes happen, that the law of *jetson* and *average* may occasion a difference.

[g] Hob. ca. 30. 2 Cro. 330. *Rich and Kneeland*.
 "The first case of the kind, said lord Holt, to be found
 "in our books." 12 Mod. 480.

[b] 1 Stra. 128. *Amies and Stevens*.

[i] Palm. 548. W. Jo. 159. See the doctrine of
inevitable accident most learnedly discussed in *Desid.*
Heraldi Animadv. in *Salmasii Observ.* in *Jus Att. et*
Rom. cap. xv.

Barcroft's case, as it is cited by chief justice Rolle, has some appearance of hardship: "a box
 " of jewels had been delivered to a ferryman,
 " who knew not what it contained, and, a sudden
 " storm arising in the passage, he threw the box
 " into the sea; yet it was resolved, *that he*
 " *should answer for it* [*k*]:" now I cannot help
 suspecting, that there was proof in this case of
culpable negligence, and probably the casket was
 both *small* and *light* enough, to have been kept
 longer on board than other goods; for, in the
 case of *Gravesend* barge, cited on the bench by
 lord Coke, it appears, that the pack, which was
 thrown overboard in a tempest, and for which
 the bargeman was holden *not answerable*, was of
 great value and great weight; although this
 last circumstance be omitted by Rolle, who says
 only, that the master of the vessel had *no in-*
formation of its contents [*l*].

The subtilty of the human mind, in finding
 distinctions, has no bounds; and it was imagined
 by some, that, whatever might be the obligation of
 a *barge-master*, there was no reason to be equal-
 ly rigorous in regard to the master of a *ship*;
 who, if he carry goods for *profit*, must indubita-
 bly answer for the *ordinary neglect* of himself or
 his mariners, but ought not, they said, to be
 chargeable for the violence of *robbers*: it was,
 however, otherwise decided in the great case of

[*k*] All. 93.

[*l*] 2 Bullstr. 280. 2 Ro. Abr. 567.

Mors and *Slew*, where “ eleven persons armed
“ came on board the ship *in the river*, under
“ pretence of *impressing seamen*, and forcibly
“ took the chests, which the defendant had en-
“ gaged to carry ;” and, though the master
was entirely blameless, yet Sir *Matthew Hale*
and his brethren, having heard both civilians
and common-lawyers, and, among them, Mr.
HOLT for the plaintiff, determined, on the
principles just before established, that the bailor
ought to recover [*m*]. This case was frequently
mentioned afterwards by lord *Holt*, who said,
that “ the declaration was drawn by the greatest
“ pleader in *England* of his time [*n*].”

Still farther: since neither the *clement*, on
which goods are carried, nor the *magnitude* and
form of the carriage, make any difference in the
responsibility of the bailee, one would hardly
have conceived, that a diversity could have
been taken between a *letter* and any other thing.
Our *common law*, indeed, was acquainted with
no such diversity; and a *private* post-master was
precisely in the situation of another carrier; but
the statute of CHARLES II. having established
a *general* post-office, and taken away the liberty
of sending letters by a *private* post [*o*], it was
thought, that an alteration was made in the
obligation of the post-master *general*; and, in the

[*m*] 1 Ventr. 190. 238. Raym. 220.

[*n*] Ld. Raym. 920.

[*o*] 12 Cha. II. ch. 35. See the subsequent statutes.
case

case of *Lane* and *Cotton*, three judges determined, against the fixed and well-supported opinion of chief justice *HOLT*, "that the post-master was *not* answerable for the loss of a "letter with exchequer-bills in it [*p*]:" now this was a case of *ordinary* neglect, for the bills were *stolen* out of the plaintiff's letter in the defendant's office [*q*]; and, as the master has a great salary for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for *safety* as well as *dispatch*, could not have been intended to deprive the subject of any benefit, which he before enjoyed; for these reasons, and for many others, I believe that *Cicero* would have said, what he wrote on a similar occasion

[*p*] *Carth.* 487. 12 *Mod.* 482.

[*q*] In addition to the authorities, before cited, *p.* 44. n. [*e*], for the distinction between a loss by *stealth* and by *robbery*, see *Dumoulin*, tract. *De eo quod interest*, n. 184. and *ROSELLA CASUUM*, 28. b. This last is the book, which *St. German* improperly calls *Summa Rosella*, and by misquoting which he misled me in the passage concerning *the fall of a house*, *p.* 68. The words of the author, *Trovamala*, are these: "Domus tua minabatur ruinam; domus corrui, et interficit equum tibi commodatum; certè non potest dici casus fortuitus; quia diligentissimus reparasset domum, vel ibi non habitasset; si autem domus non minabatur ruinam, sed impetu tempestatis validæ corruit, non est tibi imputandum."

to

to *Trebatius*, “Ego tamen scæVOLÆ assen-
 “tior [r].” It would, perhaps, have been
 different *under the statute*, if the post had
 been *robbed*, either by day or by *night*, when
 there is a necessity of travelling, but even that
 question would have been disputable; and here
 I may conclude this division of my essay, with
 observing, in the plain but emphatical language
 of St. GERMAN, “that all the *former diversities*
 “be granted by secondary conclusions derived
 “upon the law of reason, *without any statute*
 “*made in that behalf*; and, peradventure, laws
 “and the conclusions therein be the more plain
 “and the more open; for *if any statute were*
 “*made therein*, I think verily, more doubts and
 “questions would arise *upon the statute*, than
 “doth now, when they be only argued and
 “judged after the *common law*[s].”

Before I finish the *historical* part of my essay,
 in which I undertook to demonstrate, “that a
 “perfect harmony subsisted on this interesting
 “branch of jurisprudence in the codes of na-
 “tions *most eminent for legal wisdom* [t],” I
 cannot forbear adding a few remarks on the
 institutions of those nations, who are generally
 called *barbarous*, and who seem in many in-
 stances to have deserved that epithet: although

[r] Epist. ad Fam. VII. 22.

[s] Doct. and Stud. dial. 2. chap. 38. last sentence.

[t] P. II.

traces of sound reasoning and solid judgement appear in most of their ordinances.

By the ancient laws of the *WISIGOTHS*, which are indeed rather obscure, the “keeper” of a horse or an ox for *bire*, as well as a *birer* “for use, was obliged, if the animal *perished*, to “return another of equal worth:” the law of the *Baiuvarians* on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of *Charlemagne* and *Lewis the Pious* [*u*], where the *Mosaick* law before cited concerning a *borrower* may also be found [*w*]. In all these codes a *depository* of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by *fire*, and *his own* goods perish *not* with them; a circumstance, which some other legislators have considered as *conclusive* evidence of gross neglect or fraud: thus, by the old *British* tract, called the book of *CYNAWG*, a person, who had been *robbed* of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods*; and it was the same, I believe, among the *Britons* in the case of a loss by *fire*, which happened without the fault of the bailee; although *HOWEL the Good* seems to

[*u*] Lindenbrog, LL. *Wisigoth.* lib. 5. tit. 5. § 1, 2, 3. and LL. *Baiuvar.* tit. 14. § 1, 2, 3, 4. *Capitul.* lib. 5. § 204.

[*w*] *Capitul.* lib. 6. § 22. *Exod.* xxii. 14, 15.

have been rigorous in this case, for the sake of publick security [x]. There was one regulation in the *northern* code, which I have not seen in that of any other nation: if precious things were deposited and *stolen*, time was given to search for the thief, and, if he could not be found within the time limited, a *moiety* of the value was to be paid by the depositary to the owner, “ut damnum ex medio uterque sustineret [y].”

Now I can scarce persuade myself, that the phrase used in these laws, *si id perierit*, extends to a perishing by *inevitable accident*; nor can I think, that the old *Gothick* law, cited by *Stiernhook*, fully proves his assertion, that “a depositary was responsible for *irresistible force*;” but I observe, that the military lawgivers of the north, who entertained very high notions of good faith and honour, were more strict than the *Romans* in the duties, by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states, and those of a people, who could suffer disputes concerning bailments to be decided by *combat*; for it was the Emperor *Frederick II.*, who

[x] LL. *Hywel Dda*, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See also *Stiernh.* De Jur. Sveon. p. 256, 257.

[y] LL. *Wifigoth.* lib. 5. tit. 5. § 3.

Q

abolished

abolished the trial by battle in cases of contested deposits, and substituted a more rational mode of proof [z].

I purposely reserved to the last the mention of the HINDU, or *Indian*, code, which the learning and industry of my much-esteemed friend Mr. Halhed has made accessible to *Europeans*, and the PERSIAN translation of which I have had the pleasure of seeing: these laws, which must *in all times* be a singular object of curiosity, are *now* of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a *British* power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution; and, although the rules of the *Pundits* concerning *succession* to property, the *punishment* of offences, and the *ceremonies* of religion, are widely different from ours, yet, in the great system of *contracts* and the common intercourse between man and man, the POOTEE of the *Indians* and the DIGEST of the *Romans* are by no means dissimilar [a].

Thus,

[z] LL. *Longobard.* lib. 2. tit. 55. § 35. *Constit.*
Neapol. lib. 2. tit. 34.

[a] “Hæc omnia, says GROTIUS, *Romanis* quidem
“congruunt legibus, sed non ex illis primitus, sed ex
“*æquitate*

Thus, it is ordained by the sages of *Hindustán*, that “ a depositor shall carefully inquire into the
“ character of his intended depositary; who, if
“ he undertake to keep the goods, shall pre-
“ serve them with *care* and *attention*; but shall
“ not be bound to restore the value of them, if
“ they be *spoiled by unforeseen accident, or burned,*
“ or *stolen*; UNLESS he *conceal* any part of them,
“ that has been saved, or unless *his own effects*
“ *be secured*, or unless the accident happen after
“ his *refusal* to redeliver the goods on a demand
“ made by the depositor, or while the deposti-
“ tary, against the nature of the trust, presumes
“ to *make use* of them:” in other words, “ the
“ bailee is made answerable for *fraud*, or for
“ *such negligence* as approaches to it [*b*].”

So, a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing after the completion of the business, for which he borrowed it; but not, if it be *accidentally* lost or *forcibly* seized, *before* the expiration of the time, or the conclusion of the affair, for which it was lent [*c*]: in another place, it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall never-

“ *æquitate naturali*, veniunt: quare eadem apud alias
“ quoque gentes reperire est.” De Jure Belli ac Pacis,
lib. 2. cap. 12. § 13.

[*b*] *Gentoo* Laws, chap. IV, See before, p. 47.

[*c*] Same chapter. See before, p. 68.

theless recover his debt with interest, but the debtor shall not be entitled to the value of his pawn [*d*]; and that, if the pledgee *use* the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it [*e*].

In the same manner, if a person *hire* a thing for use, or if any *metal* be delivered to a *workman*, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work [*f*].

All these provisions are consonant to the principles established in this essay; and I cannot help thinking, that a clear and concise treatise, written in the *Persian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Asiatick* and *European* systems, would contribute, as much as any regulation whatever, to bring our *English* law into good odour among those, whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law*,

[*d*] Chap. I. Sect. I. Before, p. 84, 85.

[*e*] Chap. I. Sect. II. Before, p. 81.

[*f*] Chap. IV. and Chap. X. Before, p. 88. 91.

on the subject of BAILMENTS, *which have been traced by a short analysis*, are recognised and confirmed by the wisdom of nations [g]; and I hasten to the third, or *synthetical*, part of my work, in which, from the nature of it, most of the *definitions* and *rules*, already given, must be repeated with little variation in *form*, and none in *substance*: it was at first my design, to subjoin, with a few alterations, the *Synopsis* of DELRIO; but finding, that, as *Bynkershoek* expresses himself with an honest pride, *I had leisure sometimes to write, but never to copy*, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method, which logicians call *Synthesis*, and in which all sciences ought to be explained.

1. To begin then with *definitions*: 1. BAILMENT is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed.

2. DEPOSIT is a bailment of goods to be kept for the bailor without a recompense.

3. MANDATE is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them.

[g] B. fore, p. 4. and 11.

4. LEND-

4. LENDING FOR USE is a *bailment* of a *thing* for a certain time *to be used* by the borrower *without paying for it*.

5. PLEDGING is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be discharged*.

6. LETTING TO HIRE is 1. a *bailment* of A THING *to be used* by the hirer *for a compensation in money*; or, 2. a *letting out* of WORK and LABOUR *to be done*, or CARE and ATTENTION *to be bestowed*, by the bailee *on the goods bailed*, and that *for a pecuniary recompense*; or, 3. of CARE and PAINS *in carrying the things delivered from one place to another for a stipulated or implied reward*.

7. INNOMINATE BAILMENTS are those, where the *compensation* for the *use* of a thing, or for *labour* and *attention*, is *not pecuniary*, but either 1. the *reciprocal use* or the *gift* of some *other thing*; or, 2. *work* and *pains*, *reciprocally undertaken*; or, 3. the *use* or *gift* of another thing *in consideration of care and labour*, and *conversely*.

8. ORDINARY neglect is the *omission* of that *care*, which every man of *common prudence*, and *capable of governing a family*, takes of his own concerns.

9. GROSS neglect is the *want* of that *care*, which every man of *common sense*, how *inattentive* soever, takes of his own property.

10. SLIGHT neglect is the *omission* of that *diligence*, which very *circumspect* and *thoughtful* persons

persons use in securing *their own* goods and chattels.

II. A NAKED CONTRACT is a contract made without *consideration* or *recompense*.

II. The *rules*, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these :

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for GROSS neglect.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for SLIGHT neglect.

3. When the bailment is *beneficial* to both parties, the bailee must answer for ORDINARY neglect.

4. A SPECIAL AGREEMENT of any bailee to answer for *more* or *less*, is in general valid.

5. ALL bailees are answerable for actual FRAUD, even *though the contrary be stipulated*.

6. No bailee shall be charged for a loss by *inevitable* ACCIDENT or *irresistible* FORCE, except by *special agreement*.

7. ROBBERY by *force* is considered as *irresistible* ; but a loss by *private* STEALTH is *presumptive* evidence of *ordinary* neglect.

8. GROSS neglect is a *violation of good faith*.

9. No ACTION lies to compel performance of a *naked contract*.

10. A reparation may be obtained by suit for every DAMAGE occasioned by an INJURY.

11. The

II. The negligence of a SERVANT, acting by his master's express or implied order, is the negligence of the MASTER.

III. From these rules the following propositions are evidently deducible:

1. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a violation of good faith.

2. A DEPOSITARY, whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.

3. A MANDATARY to carry is responsible only for GROSS neglect, or a breach of good faith.

4. A MANDATARY to perform a work is bound to use a degree of diligence adequate to the performance of it.

5. A man cannot be compelled by ACTION to perform his promise of engaging in a DEPOSIT OF a MANDATE.

6. A reparation may be obtained by suit for DAMAGE occasioned by the nonperformance of a promise to become a DEPOSITARY or a MANDATARY.

7. A BORROWER FOR USE is responsible for SLIGHT negligence.

8. A PAWNEE is answerable for ORDINARY neglect.

9. The HIRER of a THING is answerable for ORDINARY neglect.

10. A WORK-

10. A WORKMAN for HIRE must answer for ORDINARY neglect of the goods bailed, and apply a *degree of SKILL equal to his undertaking.*

11. A LETTER TO HIRE of his CARE and ATTENTION is responsible for ORDINARY negligence.

12. A CARRIER for HIRE, by *land* or by *water*, is answerable for ORDINARY neglect.

IV. To these *rules and propositions* there are some *exceptions*:

1. A man, who *spontaneously* and *officiously* engages to *keep*, or to *carry*, the goods of another, though *without reward*, must answer for SLIGHT neglect.

2. If a man, through *strong persuasion* and with *reluctance*, undertake the execution of a MANDATE, no more can be required of him than a *fair exertion of his ability.*

3. ALL bailees become responsible for losses by CASUALTY or VIOLENCE, *after their refusal* to return the things bailed on a LAWFUL DEMAND.

4. A BORROWER and a HIRER are answerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are answerable in ALL EVENTS, if they *use* the things deposited or pawned.

6. An INNKEEPER is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

R

7. A COM-

7. A COMMON CARRIER, by *land* or by *water*, must indemnify the owner of the goods carried, if he be ROBBED of them.

V. It is *no* exception, but a *corollary*, from the *rules*, that “every bailee is responsible for a
“ loss by ACCIDENT or FORCE, however *inevita-*
“ *ble* or *irresistible*, if it be *occasioned* by that
“ *degree of negligence*, for which the nature of
“ his contract makes him generally answerable;”
and I may here conclude my discussion of this important title in jurisprudence with a general and obvious *remark*; that “*all* the preceding rules
“ and propositions may be diversified to *infinity*
“ by the *circumstances* of every particular case;”
on which circumstances it is on the *continent* the province of a *judge* appointed by the sovereign, and in ENGLAND, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide: thus, when a painted *cartoon*, pasted on canvas, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question “whether
“ the depositary had been guilty of GROSS neg-
“ *lect*,” was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial[*b*]; but it was the judge, who determined, that the defendant was by *law* responsible for *gross* negligence *only*; and, if it had been proved, that the bailee had kept *his own* pictures of the same

[*b*] 2 Stra. 1099. *Mytton and Cock*.

fort in the same place and manner, and that *they* too had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than SLIGHT neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee *without reward* was responsible for it.

Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not want leisure, to discuss in the same form every branch of *English* law, *civil* and *criminal*, *private* and *publick*; after which it will be easy to separate and mould into distinct works, the three principal divisions, or the *analytical*, the *historical*, and the *synthetical*, parts.

The great system of jurisprudence, like that of the Universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility: if LAW be a *science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but, if it be *merely* an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer, who has the strongest habitual, or arti-

ficial, *memory*. In practice, law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed, and all societies instituted, THE GOOD OF MANKIND.

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A D V E R T I S E M E N T.

AFTER I had finished the preceding tract, to the satisfaction of several friends, but not to my own, I was informed, that the learned CHRISTIAN THOMASIVS had published a dissertation on the same subject with the following title: *De Usu Practico Doctrinae difficilissimæ Juris Romani de Culparum Præstatione in Contractibus*; HALÆ, MDCCV. The fame of the author, and the high applause, which the very sensible *Bynkershoek* bestows on him, impressed me with a most favourable idea of his work, and with a strong desire to procure it; but, to my extreme disappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Universities: I have sent for it, however, to *Germany*, and, when I receive it, shall take a sincere pleasure, either in correcting such

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errors,

130 ADVERTISEMENT.

errors, as it may enable me to detect in my
essay, or in confirming the system, which I
have adopted, by so respectable an autho-
rity.



CORRECTIONS.

- p. 47. l. 26. for *more* read *less*.
- p. 51. l. 12. omit *in the house of peers*.
- p. 101. l. 15. for *locator* read *conductor*.

